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THE MOST-FAVORED-NATION CLAUSE IN COMMERCIAL TREATIES

ITS FUNCTION IN THEORY AND IN PRACTICE AND ITS RELATION TO TARIFF POLICIES

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CONTENTS

		Page
Introduction		6
Chapter I.	Commercial Treaties. The Origin, Introduction, and General Acceptance of the Most-Favored-Nation Clause	8
Chapter II.	Definitions and Classification	17
Chapter III.	Practice of the United States. The "Conditional" Clause	22
Chapter IV.	The American Interpretation	29
Chapter V.	English Practice and Interpretation	39
Chapter VI.	European and World Practice. A Background for Interpretation	48
Chapter VII.	Interpretation. The Opinions of Treatise Writers, and Rules	58
Chapter VIII.	Germany and the United States. Most-Favored-Nation Relations	79
Chapter IX.	Advantages and Disadvantages. Suggestions	98
Bibliography		113

THE MOST-FAVORED-NATION CLAUSE IN COMMERCIAL TREATIES

INTRODUCTION

The phrase "most-favored-nation" first appeared in commercial treaties toward the close of the seventeenth century. The clause in which it was used had been invented earlier in the century to meet the exigencies of that great commercial expansion which had followed upon the restless activities of the fifteenth and sixteenth centuries. The growth of international trade in the eighteenth century called for the multiplication of commercial treaties, and with the treaties the necessity for using the new clause increased.

After the American revolution, a series of treaties was made in which the clause was given an expanded and modified form. Henceforth there appear both the unqualified and the qualified forms. During the nineteenth century, while international trade became world commerce, commercial treaties became so common that they now bind the trading nations as in a fine-meshed web. In these treaties the clause of the most-favored-nation was inserted with so few exceptions as to warrant its characterization as the "corner-stone of all modern commercial treaties."

Rarely does a conditional provision so extensively used and so vital in its bearing upon economic relations escape misinterpretation and avoid becoming the source of misunderstanding. The experience of this clause has been no exception to the rule.[1] All

[1] "Wohl keine Institution der internationalen Handelspolitik hat in neuerer Zeit so viel Anfechtung erfahren wie die Meistbegünstigung." Grunzel: System der Handelspolitik, 475.

through the diplomatic correspondence of the last century there appear constant disagreements and ever-recurring irritation over what is the meaning and what are the obligations attaching to this or that clause. In view of these facts it is somewhat surprising that only recently has the clause been made the subject of special study. True, each of the more important treatises upon international law and many works upon international commerce have given it notice, while numerous articles have dealt with it briefly. The diplomatic correspondence which it has occasioned would fill many volumes. Wharton's Digest of International Law (1887) and Moore's Digest (1906) contain excellent summaries of some of this. But no monographic study appeared until the work of Mr. Herod, which was published in 1901.

The changes in world politics which ushered in the twentieth century have vastly increased the general interest in questions which affect international, and more especially commercial, relations. This widening of the political horizon has already borne fruit in the relatively immense crop of monographs which has appeared within the last decade. In this new consideration of living problems the most-favored-nation clause has begun to receive some of the attention which its importance merits. A consistent effort is being made to arrive at a common agreement as to its interpretation in existing treaties, and to so construct future treaties that there will be no room henceforth for misunderstanding.

Mr. Herod's "Most-favored-Nation Treatment" discusses the clause in general but with reference especially to the historical and legal basis for American practice. In 1902 M. Visser produced an article which furnishes a careful résumé of the history of the clause and a discussion of the chief points in the controversies to which it has given rise. Since then several German writers, especially Calwer, Kaufmann, Glier, and Schippel, have devoted very considerable attention to numerous phases of the subject. Dr. Glier's work represents an elaborate study of commercial treaties. It accomplishes very effectively the task which the author set himself—the clearing away of a mass of false impressions concerning the commercial obligations of the

United States and Germany, and Germany and Argentina. It is invaluable, also, as an index and guide. A serious study of the history and legal aspects of the clause appears in Sig. Cavaretta's book. Certain South American writers have recently contributed to the discussion. However, with the exception of Mr. Herod's book, no concise treatment has appeared in English.

For the sake of convenience and economy of space, the full titles of books will not be given in the footnotes, but only in the bibliography appended to this study; except in cases where a book or article is cited but once.

CHAPTER I

COMMERCIAL TREATIES: THE ORIGIN, INTRODUCTION, AND GENERAL ACCEPTANCE OF THE MOST-FAVORED-NATION CLAUSE

The articles contained in commercial treaties have been conveniently classified by De Martens as falling into three categories:

1. Those relating to the subjects or citizens of the contracting powers in regard to their civil rights;

2. Those relating to rights reciprocally granted to the subjects in all that concerns navigation;

3. Those which concern commerce properly speaking.[1]

As the most-favored-nation clause is an instrument for generalizing concessions and for furthering and insuring international commercial equality, it is to be expected that it will be found in a very large proportion of existing commercial treaties, and that it will be employed in connection with stipulations of each of these classes.

Commercial treaties cover, of course, a wide variety of subjects. They include importation, exportation, transit, transfer, and warehousing of merchandise; customs, tariffs, navigation laws; quarantines; tolls upon water courses and canals; the stay of boats in roadsteads and docks, and the deposit of merchandise in customs warehouses; coasting trade; the admission of consuls and their rights; stipulations which govern the respective subjects of the contracting powers in the possession and transmission of personal and real property; payment and exemption from extraordinary levies and forced loans; service

[1] De Martens: Droit international, II, 314-315.

in the army and militia; conditions of citizenship; establishment of consuls, etc., etc.[2]

While the most-favored-nation clause is used to cover and supplement agreements upon each and every one of these subjects,[3] it is the purpose of the present study to consider it with special reference to its occurrence in articles regulating commerce and navigation.

Every state has a two-fold object in its international politico-commercial arrangements: to gain and to preserve the greatest possible advantages, and to guard against present or future disadvantages and discriminations. In making treaties with this object in view, the clause of the most-favored-nation has been found one of the most convenient and effective instruments, especially for the attainment of the latter end. In substance, the clause deals with the treatment which citizens or subjects of each of the contracting powers shall receive in the territories and at the hands of the other, especially in matters of navigation and commerce. Favors in navigation and commerce extend to the articles, the agents, and the instruments of commerce. The object sought is uniform treatment without discrimination.[4]

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[2] Calvo: Droit international, III, 1597.

For an excellent discussion of the contents of commercial treaties, see Grunzel: System der Handelspolitik, 447-462. See, also, Von Melle, *op. cit.*, 210. *(For works cited in footnotes see bibliography,* p. 113 ff.*)*

[3] As examples: The treaty between Greece and Japan, May 20-June 1, 1899, stipulates for reciprocal most-favored-nation treatment as regards, (article 2) diplomatic and consular officers, (article 3) commerce, navigation, residence, hiring residences and warehouses, trading, all that concerns the acquisition, enjoyment and disposition of property of all kinds, (article 4) travel, commerce, navigation, (article 5) export and import duties and prohibitions, transit, warehousing, bounties, drawbacks, (article 7) tonnage, light and harbor dues, pilotage, quarantine, salvage in case of damages, (article 13) billeting, compulsory military service, contributions of war, military exactions, and forced loans. The coasting-trade is excepted (article 8).

The treaty between China and Mexico, December 14, 1899, while a little less complete than the above, is nearly as comprehensive and includes also (article 9) ships of war; it also provides (article 11) that if either country shall open its coasting trade, wholly or in part, to any nation or nations, the other party shall have the right to claim the same concessions or favors, "provided said contracting party is willing, on its part, to grant reciprocity in all its claims on this point."

[4] "It is clearly evident that the object sought in all * * * is equality of international treatment, protection against the wilful preference of the commercial interests of one nation over another."—Mr. Sherman's note to Mr. Buchanan, Jan. 11, 1898. Moore, *op. cit.*, V, 278.

In the simplest form of the most-favored-nation clause the contracting parties agree that in all that respects commerce and navigation, any privilege, favor, or immunity which either grants to a third state shall be granted to the other.

The surest way to arrive at an understanding of the position of the clause in modern treaties is to go to its origin and to trace it in its evolution, that is, to study it historically. Two conclusions must inevitably be drawn from such a course. To state these in advance will greatly simplify the demonstration. In the first place, the clause had a two-fold origin, and usually the two-fold object suggested above—it was at once a political and an economic instrument. In the second place, two leading schools of interpretation have grown up, the one demanding a strict, or literal, interpretation of the words of the clause, the other insisting upon a practical and more political interpretation. Of the leading exponents of these radically different interpretations, the nation which holds to the former, Great Britain, is at the same time the greatest exponent of the principles of free trade; while the nation which insists upon the latter, the United States, is the foremost advocate of the theory and practice of protection.

The commercial idealism which swept over Europe in the middle of the nineteenth century emphasized the theory and practice of unconditional most-favored-nation treatment, and this practice has gained the general adherence of European states. The United States on the other hand has continued to practice a "qualified" extension of favors, on the basis of tangible reciprocity.[5]

Most writers on international law, inferring from the fact that in its practical development the clause of the most-favored-nation has been most frequently applied as a regulator of commercial relations, affirm that it owes its origin to a movement eminently economic. Sig. Cavaretta points out, however, that in its first appearance, it was due to political rather than economic exigencies, although these were of course closely allied

[5] "Reciprocity" is to be carefully distinguished from "retorsion" and "retaliation." It is a business principle, practicable and equitable, recognizing the fundamental fact that in international commerce as in private business, exchanges are made upon a basis of "equivalents."

with elements of an economic character. He discovers the embryo of the clause in the treaty of November 8, 1226, in which the Emperor Frederick II conceded to the city of Marseilles the privileges previously granted to the citizens of Pisa and of Genoa. These concessions were dictated by political motives.[6]

Although the practice of granting reciprocal favors and the theory of favored nations had existed much earlier than this treaty, and although this example was followed with modifications during succeeding centuries, it is not until the seventeenth century that the real clause of "the most-favored-nation" makes its appearance in written treaties.[7]

Previous to this time the number of nations engaged in international commerce, as regulated by treaties, was small. Trade was really carried on by the adventurous few, and was, as a rule, either sporadic or governed by monopolies. As world commerce increased in the fifteenth and sixteenth centuries, as England and Holland set themselves to compete with Spain and Portugal, and the French and Scandinavians commenced to dispute the supremacy of the Hanseatic League and the waning power of the Italian Republics, conditions were changed.

From the beginning of the seventeenth century, international trade increased by leaps and bounds. The political machinery was not far behind the economic. Each state wished to have a guarantee of the greatest possible advantages for its commerce and industry, and, in return for the advantages which it gained, it had to give concessions. In order to establish the guarantees, treaties became necessary and frequent. In order to avoid repetition, a clause was framed which should refer back, embrace the conditions of the treaties already existing, and extend their provisions to the newly contracting states. This clause was that of the "most-favored-nation."

Not only did this clause generalize previous provisions; it per-

[6] Cavaretta, *op. cit.*, 59.

[7] For a detailed study of analogies to the clause in early times, see Cavaretta, *op. cit.*, 12–61.

In a treaty between England and certain cities of Flanders and Brabant, Aug. 4, 1446, appeared this provision: "Item: que les marchands d'Angleterre * * * seront traités aussi doucement et gracieusement comme les autres nations fréquentant ces pays et villes."

formed a more important function, namely, to safeguard the state in whose treaties it appeared against future discriminations. This made it at once of great importance. Thus M. Visser finds the principal cause for its extensive use in the economic necessity which forced each state, in the clash of international commercial competition, to guard against falling into a position of disadvantage.[8]

In the beginning, this extension of favors was made but to one or two specified states. For instance, in the agreement, July 6, 1612, between the United Provinces and the Porte, the former secured the same advantages which had already been granted to Great Britain and France. The next step was to extend the advantages to include such favors as should be granted to certain other specified nations; then to include advantages granted *to any nation whatsoever*. Thus article 4 of the treaty between Great Britain and Portugal, January 29, 1642, specifies that subjects of Great Britain shall enjoy all the immunities accorded the "subjects of any nation whatsoever in league with the Portugals." This treaty is regarded as marking a turning point in the economic and political relations of the two countries.

A treaty between Great Britain and Sweden, April 11, 1654, stipulated for the enjoyment by the citizens of each country in the realms of the other of the same privileges "as any other foreigner at present doth, or hereafter shall enjoy there." In 1659, in the treaty between France and Spain it was guaranteed that the subjects of each sovereign while in the realms of the other "seront traités comme la nation la plus favorisée, ne payant que les mêmes droits auxquels les Anglais et les Hollandais sont soumis". The treaty of February 13, 1661, between Great Britain and Denmark contains the words, in article XI, "people of any foreign nation whatsoever." The Anglo-Danish treaty of November 29, 1669, contained the phrase "whatsoever foreign nations". A treaty in September, 1675, between Great Britain and the Porte used the formula "whatsoever other Christian nation" (article III); while that of August 16, 1692,

[8] Visser, *op. cit.*, 78. Cf. Glier, *op. cit.*, *passim*.

between Denmark and the Hanse cities, contains the phrase "most-favored nation" (article VI).[9]

In the eighteenth century, the treaty of commerce assumed greater importance, and with it the importance and the frequency of appearance of the clause increased. Not, however, until toward the end of the century did commercial treaties begin to assume the frequency which characterized their appearance during the nineteenth century. In the transition from the old exclusive system, one of the first steps was the recognition of the principle of free commercial intercourse. Not until states had gotten away from the mercantile theory, not until men's minds were disabused of the idea that the profit of one state meant loss to another, that in a commercial transaction only one party gains, was an extended world commerce possible. Once this conception disappeared, the régime of monopoly and of the mercantile system gave place to extensive reciprocal commercial arrangements between nations, and the rapid opening of world commerce. The most-favored-nation clause appeared in treaties of the eighteenth century more often than has been imagined. Even so authoritative a writer as Grunzel has underestimated the importance which it had assumed. The idea of a "qualified" or "conditional" form had not yet originated, but the clause occurred in the known, unconditional form in so many treaties that Dr. Glier feels warranted in characterizing the eighteenth century as that of unconditional most-favored-nation treatment.[10]

The success of the American revolution was of the greatest importance in all that relates to commerce. Soon after the signing of the Declaration of Independence the United States began

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[9] *Cf.* Treaties between Portugal and the United Provinces, Aug. 6, 1661; and Great Britain and Sweden, July 17, 1656, and Oct. 21, 1661.

Early commercial treaties were limited largely to provisions concerning the commerce between the contracting parties. As the most-favored-nation provision entered, and as the treaty circle widened, it became customary to add a guarantee for equal treatment of subjects. A further provision guaranteeing religious freedom to foreigners also became common, a provision which came to have a very substantial value in certain countries.

[10] For examples see the following treaties: England-Portugal, Dec. 27, 1703; England-Spain, Dec. 9, 1713; England-Spain, Dec. 14, 1715; England-Spain, Oct. 5, 1750; England-Sweden, Feb. 5, 1766; Prussia-Saxony, June 18, 1766; England-Russia, June 20, 1766; Portugal-Denmark, Sept. 26, 1766.

making treaties with European nations. In nearly all the treaties which were then and subsequently made by the United States, the clause of the most-favored-nation was inserted, but in a form which, then for the first time, specified that the advantages to be accorded were to be in return for an *equivalent*. The treaty with France, February 6, 1778, the first which the United States made, contained the first example of this new development. Here, in article II,

> The Most Christian King and the United States engage mutually not to grant any particular favor to other nations in respect of commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same favor, *freely, if the concession was freely made, or on allowing the same compensation, if the concession was conditional.*[11]

Treaties with Sweden, April 3, 1793, and Prussia, September 10, 1785, contain similar stipulations. With the making of these treaties, there begins the development of the so-called "American interpretation."

Up to this time there had been no expression of the "conditional" principle. Americans originated and established the formal insertion of the stipulation that special favors must be specifically bought, that the most-favored-nation clause would not serve to give one nation without compensation an advantage for which another had paid, that is, that it would not generalize concessions.

From this time the clause existed, and has been used, in two forms. The United States at once made treaties with a number of European powers, regularly using the conditional form of the clause. The states of Europe, continuing for a time to use the conditional form among themselves, used the other form in their treaties with the United States, and gradually adopted the principle of compensations which underlay the American policy. While the United States has persisted throughout to the present time in the use of the one form, the alternative practice appears in European treaties through a

[11] In the making of this treaty, it is interesting to note, France was considering her political even more than her economic interests.

long period up to 1860, after which an entirely new direction was taken. These various phases will be enlarged upon as our discussion advances.

By the end of the 18th century the principle that commercial intercourse should not be prohibited or unduly hampered had been generally, but by no means universally recognized among the leading Western nations. Neither the American Revolution nor the inauguration of a new era after the Napoleonic wars served to do away entirely with the old restrictions. The Americans stood from the first for a perfect "equality" of treatment in matters of trade and navigation, but the idea of national monopoly clung in the minds of certain European statesmen of the old school and the last vestiges of it were not cleared away until the middle of the nineteenth century.

However, with the beginning of the century the number of commercial treaties increased enormously. The most-favored-nation clause became a regular part, and its function in regulating the multiplex counter-rights of the subjects of treaty-bound states increased in due proportion to the number of treaties. The insertion of the clause came to be looked upon almost as a matter of course. Schmoller has characterized the clause as the "völkerrechtliche Eckpfeiler aller neueren Handelsverträge." The clause was regularly inserted in the treaties of the Zollverein. It was used throughout the series of treaties fashioned under the new commercial policy of Napoleon III. Since 1860 it has occurred almost invariably. It forms the basis of the present commercial relations of France and Germany. It appears in most of the commercial treaties of the United States and Great Britain. It is prevalent in that large group of European treaties which were made in the last ten years of the century. The new German treaties contain it without exception, in absolute form. France holds to it as far as possible in spite of her adoption of the double tariff.[12]

Spain having developed an elaborate commercial policy, meant to rid herself of the cramping restrictions of the clause, but in practice she succeeded only to a very limited extent in

[12] *Cf.* Visser, *op. cit.*, 72-74.

effecting this exclusion. Portugal, with a similar policy, has succeeded in making only a few treaties without the clause. Switzerland for some time opposed the clause, but has continued to use it. It occurs in the majority of the new Japanese treaties, and in recent Chinese treaties, having in several of these a very wide extension. In some South and Central American states an agitation against the clause was begun on account of embarrassment caused by the conditional form. A few of these states denounced their commercial treaties with European countries, thinking these treaties an obstacle to their project of forming a customs-union, but in their treaties which remain in force the most-favored-nation clause is found regularly. We may conclude that as commercial treaties exist today they generally contain this clause in some form, and that attempts to get rid of it have not been very successful.[18]

A new phase in the history of the clause began with the rise of the double-tariff systems. The "maximum-and-minimum" system invented in Spain was adopted by the French with the affirmed object of freeing the legislature from the checks imposed by the régime of treaties of commerce. Spain, France, Russia, Brazil, Greece, and Norway adopted this system wholly or in part. The Germans developed the "general-and-conventional" system which has been extensively imitated and is meeting with constantly increasing favor. The preferential-tariff movement is giving us a double-tariff in still another form. The effect of these developments upon the clause of the most-favored-nation will occupy our attention in a subsequent chapter.

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[18] "On peut donc dire que les traités de commerce se basent en général sur le traitement de la nation la plus favorisée. Presque tous les traités contiennent une clause garantissant ce traitement d'une manière plus ou moins étendue, et le petit nombre d'états qui ont essayé de s'y soustraire n'y ont réussi que fort peu. Il s'entend que les exceptions faites en ce qui concerne le commerce frontière, les relations avec les états avoisinants ou la faculté de conclure une union douanière n'enfreignent pas le principe d'une manière importante. Ces réserves ne présentent que peu d'intérêt ou sont expliquées par les nécessités du voisinage." (Visser, *op. cit.*, 77.)

CHAPTER II

DEFINITIONS AND CLASSIFICATIONS

In order to simplify the study of the clause as it appears in many treaties, we may first consider the limitations within which it operates and the general forms in which it occurs. It is not intended that the clause shall operate so as to affect the internal policy of the state; it applies solely to treatment of foreign states, that is, to the relative treatment of the citizens and the commerce of foreign states. It is not usually considered as comprehending special arrangements and reciprocity between nations, where on account of proximity or special circumstances, reason exists for relations which cannot be shared by the world at large.[1] Special relations between a colony and the mother country are generally understood to be exempt from the operation of the clause.[2] The term "most-favored-nation" is sometimes replaced by "most-favored-foreign-nation," though even where not so specified, that meaning is understood, as the contracting parties do not mean, for the purpose of the clause, that reciprocal relations between themselves and their colonies shall be considered as standards for most-favored-nation treatment.

With these exceptions, the scope of the clause appears to be limited only by its wording and the interpretation put upon that wording. The clause sometimes stipulates that whatever advantages are accorded by either contracting party to a third state shall extend to the other; sometimes, that this shall be so

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[1] *Cf.* Herod, *op. cit.*, 112-115; Visser, *op cit.*, 162; treaty between Great Britain and Uruguay, July 15, 1899; treaty between United States and Ecuador, June 13, 1839; treaty between Holland and Portugal, July 5, 1894.

Cf. cases cited *infra, passim.*

[2] " * * * bleiben gewöhnlich die wechselseitigen Begünstigungen im Handelsverkehr der Mutterländer mit ihren Kolonien ausserhalb des normalen Meistbegünstigungszwanges." Oncken: Handwörterbuch, IV, 1074.

without equivalent; sometimes it forbids putting obstacles to the commerce of one which are not extended to the commerce of other nations. In some clauses there exists a limitation including or excluding certain nations; again the advantages are specified or limited; sometimes the articles which are to enjoy special treatment are enumerated.

It is customary to limit the time of duration of a commercial treaty. Ten and twelve year periods are those most frequently prescribed in modern treaties, but numerous writers have suggested a shorter period of say five years. On the side of stability, there is much to favor the longer period, yet the rapidity with which economic conditions change makes a powerful argument for the increased flexibility which would be gained through the use of the shorter period.

The guarantee of mutual most-favored-nation treatment appears in a positive as well as in a negative form. In the positive form one or both of the contracting parties pledge that "every favor, every advantage, and every lowering of duties, which is or shall be granted a third party shall be granted to the other." In the negative form the guarantee is that "in none of the respects mentioned in the treaty shall third parties be treated more favorably than the co-contractants".

An analysis and arrangement of the forms in which the clause occurs leads to the following classification.[3]

Form 1. The *form of simple transfer,* which grants a privilege without reciprocity or condition. This often appears as a unilateral provision, especially in treaties between Christian or highly-civilized and non-Christian or semi-civilized states, whereby the favors are extended to the former without reciprocity. In this form,

One state grants to the other all the privileges granted to any other.[4]

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[3] *Cf.* Classification by Herod, *op. cit.,* 5-7; Cavaretta, *op. cit.,* 8-9; and Glier, *op. cit.,* 229-232.

[4] Thus the capitulations and treaties of the Porte. Turkey has as a rule signed treaties for unilateral and absolute most-favored-nation treatment. In the treaty with Portugal, May 20, 1843, Article XII, there is an appearance of reciprocity on a conditional basis. In 1861 and 1862, France, Great Britain, Sweden-Norway, Denmark, Holland, Russia, the Zollverein, and the Hanse cities secured unilateral, unconditional, most-favored-nation pledges from Turkey.

Form 2. The *specialized reciprocal form,* which applies only to favors mentioned in the treaty. For instance:

No other or higher duties shall be imposed by either of the high contracting parties on the importation of any article, the growth, produce or manufacture of the other, than are or shall be payable on the like articles, being the growth, produce or manufacture of the most-favored-nation.[5]

Form 3. The *simple reciprocal form.*

The high contracting parties agree that, in all that concerns commerce and navigation, favors which either has granted or may hereafter grant to any other state shall be granted to the other party.

The United States–Turkish treaties of 1830 and 1862 are on the same basis. The United States has made other treaties on this non-reciprocal basis with Morocco, Siam, China, Muscat, Samoa, Egypt, and Zanzibar. For a long time China, Japan, and Siam were treated on this basis, and some of their treaties containing the clause in this form are still in force.

In the treaty between Japan and Great Britain, Oct. 14, 1854, article V provides: "In the ports of Japan either now open or which may hereafter be opened to the ships or subjects of any foreign nation, British ships and subjects shall be entitled to admission and to the enjoyment of an equality of advantages with those of the most-favored nation, always excepting the advantages accruing to the Dutch and Chinese from the existing relations with Japan." In the treaty between China and the United States, Oct. 8, 1903, article III provides that citizens of the United States in the open or hereafter to be opened ports of China "shall generally enjoy as to their persons and property all such rights, privileges, and immunities, as are or may hereafter be granted to the subjects or citizens of the nation the most favored in these respects."

[5] Treaty between China and United States, July 28, 1868, article 6, specifies for most-favored-nation privileges as regards *travel* and *residence.* In the treaty between France and Italy, Nov. 3, 1881, article XVII provides that each contracting party engages to allow the other to profit by any privilege or lowering of the tariff duties on the *importation* or *exportation* of articles, whether mentioned or not in the treaty, which one of them has accorded or shall accord to a third power, (the terms of the treaty not to apply to articles which are the objects of state monopoly). Treaties between France and Honduras, Feb. 11, 1902; France and the Dutch Colonies, Aug. 13, 1902; and France and Nicaragua, Jan. 27, 1902, provide for most-favored-nation treatment as regards duties on importation and exportation of specified articles. The form adopted in the treaty between Great Britain and Uruguay, July 15, 1899, specifically restricts the application. "The stipulations contained in the treaty * * * do not include cases in which the Government of * * * Uruguay may accord special favors, exemptions, and privileges to the citizens or the productions of the United States of Brazil, or of the Argentine Republic, or of Paraguay in matters of commerce. Such favors cannot be claimed in behalf of Great Britain on the ground of the most-favored-nation rights as long as they are not conceded to other states." This form is prevalent in recent treaties of South American states. See treaties between United States and Great Britain, Nov. 19, 1794, article XV; Holland and Spain, July 12, 1892, articles II, VI; Holland and Italy, Nov. 24, 1863, article II; Holland and Austria-Hungary, March 26, 1867, article II.

This includes the majority of British treaties.[6]

Form 4. The *imperative and unconditional form.*

The high contracting parties agree that all favors, etc., in all that concerns commerce and navigation which either has already granted or may hereafter grant to any other state, shall immediately and without condition become common to the other party.[7]

Form 5. The *qualified, or conditional, reciprocal form.*

The high contracting parties agree that in all that concerns navigation and commerce, favors which either has already granted or may hereafter grant to any other state shall become common to the other party *who shall enjoy the same freely if the concession is freely made, or upon allowing the same compensation if the concession was conditional.*

This is the form which appears in almost all of the treaties

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[6] In the treaty between Great Britain and Servia, June 28–July 10, 1893, articles I, II provide: "The two contracting parties engage reciprocally not to accord to subjects of any other power in matters of navigation or commerce any privilege, favor, or immunity, whatever, without extending them during the duration of the said concessions to the commerce and navigation of the other party, and they will enjoy reciprocally all the privileges, immunities, and favors which have been or shall be conceded to any other nation." In that between Japan and China, July 21, 1896, article IV grants, "in all respects the same privileges and immunities as are now or may hereafter be granted to the subjects or citizens of the most-favored nation." A convention between Austria-Hungary and Mexico, Sept. 17, 1901, grants "Most-favored-nation treatment not only as regards importation, exportation, transit and in general everything relating to commercial operations and to navigation, but also carrying on of business and of manufactures and the payment of taxes in connection with them." *Cf.* Treaties between United States and Great Britain, July 3, 1815; Great Britain and Netherlands, Oct. 27, 1837, article I; Russia and Great Britain, Jan. 12, 1859, article X; France and Mexico, Nov. 27, 1886, article II; Germany and France, May 10, 1871, article XI; Servia and Greece, June 17, 1894; Roumania and Bulgaria, March 4, 1895; Belgian treaties with Denmark, Greece, and Sweden, 1895; and numerous treaties cited *infra.*

[7] The treaty between Germany and Austria-Hungary, Dec. 6, 1891, as amended and completed Jan. 25, 1905, provides that no more favorable conditions in respect of import, export, or transit duties shall be granted by either contracting party to a third power than shall be accorded to the other party, and that any concession of this kind made to the third power shall *at once* be applied to the other. Any dispute relating to these provisions to be referred to arbitration (article 23*a*). In the treaty between Great Britain and France, Feb. 28, 1882, it is provided that " * * * with the exception above stated, each * * * engages to give the other immediately and unconditionally the benefit of every favor, immunity, or privilege in matters of commerce or industry which has been or may be conceded by one * * * to any third nation, whatsoever, whether within or beyond Europe." *Cf.* Treaties between Great Britain and Italy, June 15, 1883, article XI; Russia and Denmark, Mar. 2, 1895, article I; and treaties cited, *infra.*

of the United States. It has, at one time or another, been used by almost all treaty making countries, but has been abandoned by European countries in favor of the unconditional. Japan uses it in most of her treaties, and it is used in the majority of the treaties of South and Central American states. The modifying or conditional clause "freely if—freely made," etc., contains the principle which the United States secretaries have consistently claimed shall govern the interpretation of the clause whether expressly stated or not.[8]

A distinction must be understood between the terms "qualified or unconditional" (bedingt), and "limited" (beschränkt). The former terms refer to the requirement for equivalents, the latter to time or territorial limitations. The term "absolute" implies that the clause is neither conditional nor limited.

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[8] An especially good example occurs in the treaty between Greece and Austria-Hungary, March 4, 1835, which specifies that where a concession is given in return for certain advantages such concession shall be given to the other party to the treaty if a similar compensation is offered and as soon as this compensation or an equivalent is assured. But in either case a special convention must be made between the two parties to the treaty. In the treaty between the United States and Ecuador June 13, 1839, article XXXIV, "it is further agreed that the words 'most-favored-nation' * * * shall not be so construed as to prevent either of the contracting parties from concluding any treaty or convention with any other nation or state it may think proper as freely and as fully as though the said words were not used." * * * In the treaty between the United States and Japan, Nov. 22, 1894, article XIV provides: "The contracting parties agree that in all that concerns commerce and navigation, any privilege, favor, or immunity which either has actually granted or may hereafter grant to, * * * any other state shall be extended to * * * the other high contracting party *gratuitously if the concession in favor of that other state shall have been gratuitous, and upon the same or equivalent conditions if the concession shall have been conditional; it being their intention,*" etc. *Cf.* treaties between Argentine Confederation and Prussia, Sept. 19, 1857, article III; and Argentine Confederation and Japan, Feb. 3. 1898, article IV. For a complete list of U. S. treaties containing this form, 1778-1887, see Herod, *op. cit.* 13, note. *Cf.* treaties: Portugal-Prussia, Feb. 20, 1844, article XII; England-Liberia, Nov. 21, 1848; Zollverein-Netherlands, Dec. 31, 1851, article XXXIII; Holland-Liberia, Dec. 30, 1862, article XI; North Germany-Liberia, Oct. 31, 1867, article VI; and recent Japanese treaties.

CHAPTER III

PRACTICE OF THE UNITED STATES: THE CONDITIONAL CLAUSE

When the United States entered the list of nations with the enthusiasm of a people newly independent, united, and thoroughly conscious of its economic and political tasks, one of its first steps was to invite relations of amity and free intercourse with the older nations, nations from which it needed so much and to whom it had much to give. We at once threw open our ports to all foreign nations and endeavored to secure in those countries the privileges enjoyed by their own and other subjects, offering reciprocal advantages. Our earliest agreements show a desire to give and to accord the most liberal terms to international trade, to avoid exclusive relations, and to base our commercial intercourse upon the principle of give and take. The central feature in our commercial policy from the first has been reciprocity, as a survey of our treaties will clearly indicate.

As has been pointed out, the special limiting clause which expresses the American idea in commercial treaty-making and forms the basis of American interpretation was first inserted in treaties of the United States. It was inserted in our very first treaty, and it has, with few exceptions,[1] appeared in all our treaties from that day to this. The limiting clause has been omitted in cases which we will mention, and one or two instances of irregular interpretation have occurred.

When our friendly proposals for commercial reciprocity were rejected by several nations, when we found foreign restrictions and discriminations operating against us, very soon after the ratification of the constitution, we threatened retaliation. Our

[1] See chapters IV and VIII.

economic situation was such that an extensive program of retaliation was inexpedient. Consequently we contented ourselves with imposing countervailing tonnage duties. Our object was three-fold, to force what we considered fair conditions of trade, to gain access to colonial markets, and to add to our own revenue. We were especially anxious also to give to our own merchants a monopoly of our carrying trade.

During the next twenty-five years our foreign relations exhibit a series of attempts which witness an urgent desire on the part of our government to secure a share in the lucrative trade of the colonies of several European countries, and to secure definite statements, in treaty form, of such privileges as foreign nations would allow us both in their colonial and in their home ports, rather than to leave these to the whims of legislation. Our commercial policy was then, and has been, except as we have especially favored our own merchants, uniformly in the support of equal terms to all nations. We have made it a practice not to grant special favors, unrequited to some nations to the exclusion of others. We have endeavored to grant and to secure equal opportunities in our commercial dealings with all nations.

Soon after the imposition of the tonnage duties an act was passed authorizing the President to suspend these duties in favor of any country which showed us similar consideration. France was the only important commercial nation which did not soon meet us on this proposition. At first reciprocity in navigation privileges was effected by legislation only. Great Britain preferred that the stipulation be incorporated in the treaty of commerce of 1815. The United States soon began the regular incorporation of this principle in treaties.

European students have characterized the tariff history of the United States as monotonous in the extreme. We have had no great struggle such as was waged in England for thirty years over the abolition of the Corn Laws; there has been no great turning point such as is marked in English tariff history by the Cobden treaty and in Germany by the Caprivi treaties; our tariff controversies have developed no great statesmen whose names and fame are connected with some single great commer-

cial issue. These facts serve to emphasize the general consistency of American tariff policy. With a few temporary lapses, after we had once inaugurated the protective-tariff system our commercial policy has been intimately associated with protective principles. As a result our treaties present a uniformity and a regular adherence to a given form, while the interpretation which our statesmen have put upon our agreements exhibits a unanimity which may be sought in vain in European practice.

Throughout this tariff history we see running an unbroken line of tariffs, almost all of them protective, in which a single-schedule tariff with fixed duties applies to imports from all countries alike. It has not been the policy of the United States to modify its tariff by treaties, creating thereby a two-column tariff. The double-tariff is a modern invention of European countries. But the United States has had some experience with the tariff-treaty in the form of reciprocity treaties. In these certain countries, for compensation, have been given, generally on account of unusual geographical position or political circumstances, reductions from the general tariff; but each time in return for a practical, tangible compensation.[2]

The history of our treaty-making begins with the French treaty of 1778. In article II of that treaty we find the promise that neither country will "grant any particular favor to other nations, in respect to commerce and navigation, which shall not immediately become common to the other party, * * * freely if the concession was freely made, or on allowing the same compensation, if the concession was conditional." In contrast with the guarantee of immediate, unconditional extension of favors to the co-contractor contained in the majority of modern European treaties, this clause expressly says that the second party shall enjoy the favor only in case it is freely ex-

[2] Previous to 1890, our tariff treaties were three in number, with Canada, with Hawaii, and with Mexico. (But this last was dropped four years after ratification because the legislation necessary for its operation had not been enacted.) After the McKinley Act of 1890, we made reciprocity agreements with six South and Central American countries, and with Germany, Great Britain, Austria-Hungary, and Spain, all of which were terminated when the tariff act of 1894 went into effect. Under the provisions of the tariff act of 1897 we have made reciprocity agreements with France, Portugal, Italy, Germany, Cuba, and Brazil.

tended to a third party, and that in case it is given for a *compensation* the second may not be excluded from it but may have the right to demand it "on allowing the same compensation." This makes the clause not an instrument of acquisition but a preventive against discrimination. It is this idea which has been written into nearly all of the series of American treaties and which the state department has always insisted regulates them. The treaties of the United States, examine them at such intervals as we may choose, give evidence of steady continuance in the same principle.

Our second commercial treaty was that made with Sweden, April 3, 1783, by whose second article it was agreed "not to grant hereafter any particular favor" [in navigation or commerce, to a third party] "which shall not immediately become common to the other party, who shall enjoy the same freely", etc. * * * "or on allowing the same compensation, if the concession was conditional." In articles III and IV it was agreed not to impose higher duties, etc., "than those which most-favored-nations are or shall be obliged to pay." Comparing this with the French treaty, we may conclude that no condition attaches to the most-favored-nation treatment *pro praeterito,* but that the treatment *pro futuro* is made conditional upon compensation, that is, the operation is, for the present to give each other treatment equal to that accorded any nation—for the future, to insure each against being discriminated against by the other.

A survey of our treaty-making up to 1816, shows that we concluded six commercial agreements—with France, Sweden, Prussia, Great Britain, Sweden-Norway, and Algiers—containing most-favored-nation clauses. But we at no time recognized the unconditional principle. We regularly established present equality and guaranteed future concessions on a reciprocal basis. We established no differential; quite the contrary. No exclusive arrangement was to be allowed which would work to the disadvantage of parties to other of our treaties. The opportunity was to be given for each country to purchase for itself such favors as might be granted to others for compensation.[8] That

[8] The claim has been made for the treaty of Great Britain of 1815 that it guarantees unconditional most-favored-nation treatment, since it does not contain the "compensation" clause. But see *infra.*

this principle differed from that current before the United States entered the field, and that it differs from that held in Europe today is evident. But it is well to notice that the wording used in American treaties was, and is, different from that used in the older and the newer European treaties.

We have already pointed out that the policy of the United States was one of free commercial intercourse. In these early treaties we find numerous expressions which indicate the intention of their framers. For instance, in the preambles of the treaties with France and Sweden it is laid down that it is the intention to fix in "an equitable and permanent manner the rules" for governing the commercial relations of the two States, that "the most perfect equality and reciprocity" is sought, and that it is an object "to avoid all those burdensome preferences which are usually the sources of debate, embarrassment and discontent." But each country is to be absolutely free to make "those interior regulations which it shall find most convenient to itself * * * founding the advantages of commerce solely upon reciprocal utility and the just rules of free intercourse—reserving withal to each party the liberty of admitting at its pleasure other nations to participation of the same advantages."

It would be unprofitable to repeat from successive treaties to show how the United States continued in the use of the "compensation" clause. The fact that it did so will be amply illustrated when we turn to consider cases of interpretation. It is far more important that we notice the few cases of deviation or apparent deviation from that which we consider the established rule.

First comes that group of treaties known as "unilateral". The United States made treaties of this sort with Morocco, 1787 and 1836, Zanzibar, 1833, Japan, 1854, China, 1858, Egypt, 1884, and the Congo, 1891.[4] Of these treaties, that with Japan is no longer in force, and that with China has been virtually

[4] In the treaty of Sept. 16, 1836, with Morocco, article XIV, the guarantee appears: "The commerce of the United States shall be on the same footing as is the commerce of Spain or as that of the most-favored-nations." In that with the Congo, Jan. 24, 1891, article XI: "The United States shall enjoy in the Independent State of the Congo as to import duties, all the advantages accorded to the most-favored-nations."

suspended by subsequent treaties. In the application of these agreements, as the United States does not give most-favored-nation treatment in return, the stipulation may be regarded as unconditional most-favored-nation treatment *for* the United States in the realms of the other parties to these contracts. But, from the exceptional circumstances under which a unilateral treaty is made, we can see at once that these do not constitute an infringement of the established rule.

Next comes a group of treaties from which the reciprocity clause was omitted. This includes treaties with Holland, Oct. 8, 1782, Great Britain, 1794 and 1815, France, 1800, and Hanover, 1840. Four of these contain only that clause which expresses the negative side of most-favored-nation treatment. That with France of 1800 contains also the clause expressing the positive side. None contain the words "immediate" or "unconditional". They are, generally speaking, exceptional to United States practice in what they omit, but there is no valid reason for supposing that they guarantee "unconditional" most-favored-nation treatment.[5]

There are, however, three United States treaties which can from their form be put down as guaranteeing absolute and unconditional most-favored-nation treatment. These are the Swiss treaty of Nov. 25, 1850, the treaty with the Orange Free-State, Dec. 22, 1871, and that with Servia of Oct. 14, 1881. None of these contain the compensation clause. In all three the contracting parties guarantee to each other the immediate enjoyment of commercial favors and advantages which they may grant to third nations. The only one of these which has ever occasioned difficulty through a demand by the other party that the United States accord it unconditional most-favored-nation treatment was the Swiss. The clause in the Swiss treaty which caused the difficulty has since been abrogated. The treaty with the Orange Free-State has fallen. The treaty with Servia may be said to stand alone as an unconditional most-favored-nation treaty of the United States.[6]

[5] See further in chapter VIII.
[6] See chapters IV and VIII.

A survey of the list of our treaties in force discloses the fact that the United States employs the clause by no means as regularly as was once the case, and in by no means as large a proportion of its treaties as is the practice of the leading European States. The reciprocity agreement, without the most-favored-nation clause, is the instrument which has been employed in a number of instances in recent years for regulating our commercial dealings with several important nations. But in our most-favored-nation treaties that form of the clause requiring compensation is not only the prevailing but the absolutely determining form.

CHAPTER IV

THE AMERICAN INTERPRETATION

As in our treaty making, so in our interpretation, our practice has been regular, although there are a few cases in which our secretaries of state have strayed from the lines of construction beaten by their predecessors. As our treaty-making authorities have often been subjected to harsh criticism abroad, largely because our treaty-making machinery is not understood, so our department of state has frequently been attacked for its construction of the most-favored-nation clause where the fault was not one of inconsistency upon our part, but was due to the critics' ignorance of our practice and of the intention of the negotiators.

In some cases our secretaries of state, even while following the uniform interpretation, have made loose statements concerning the nature of the clause in justification of that interpretation. Secretary Fish appears to have considered it right to apply to United States treaties the current European interpretation, that is, to regard the most-favored-nation clause as being unconditional.[1] Secretary Gresham held a view different from that which ultimately prevailed concerning most-favored nation obligations in connection with countervailing duties, and his position regarding the mutually exclusive subject matter of Articles VI and XI of our treaty with Russia of 1832 cannot be accepted.[2] Still our diplomatists and our courts have, with remarkable unanimity, maintained that in the operation of the most-favored-nation clause in our treaties, even though the clause itself may not contain an express stipulation to that

[1] See note to Mr. Garcia, May 14, 1869. Moore, *op. cit.*, V, 262.
[2] See note to Prince Cantacuzène, Feb. 16, 1895. Moore, *op. cit.*, V. 274–276.

effect, either contracting party may always require an equivalent for concessions which are demanded in virtue of the clause, except when these concessions have been made freely to third parties.

> You will doubtless have understood that where the words "qualified" and "unqualified" are * * * applied in the most-favored-nation treatment, they are used merely as a convenient distinction between the two forms [which] such a clause generally assumes in treaties, one containing the proviso that any favor granted by one of the contracting parties to a third party shall likewise accrue to the other contracting party, freely if freely given, or for an equivalent if conditional—the other not so amplified. This proviso, when it occurs is merely explanatory, inserted out of abundant caution. Its absence does not impair the rule of international law that such concessions are only gratuitous (and so transferable) as to third parties when not based on reciprocity, or mutually reserved interest as between the contracting parties. This ground has been long and consistently maintained by the United States.[3]

The United States first had occasion to define its position expressly and to defend it vigorously in the controversy which arose over the provisions of the treaty of April 30, 1803, with France, article VIII of which provides:

> In future and forever after the expiration of the twelve years, the ships of France shall be treated upon the footing of the most-favored-nation in the ports above mentioned.[4]

When, subsequently, under the operation of the reciprocal agreement between the United States and Great Britain, July 3, 1815, the ships of the latter enjoyed a national treatment in the harbors of the United States, which was not allowed to the ships of France, the French government, while refusing to grant an equivalent to the United States, demanded the same treatment which was accorded to England, insisting upon the literal inter-

[3] Mr. Bayard to Mr. Hubbard, July 17, 1886. Moore, *op. cit.*, V, 273. *Cf.* Whitney *v.* Robertson (1888), 124 U. S. 190.

[4] Moore, *op. cit.*, V, 257-260. American State Papers, For. Rel., V.

pretation of the most-favored-nation clause, contending that "a clause which is absolute and unconditional can not be subject to limitation or any modification whatever." The United States government emphasized the equivalent. The French replied that France had given an equivalent at the time of the cession of Louisiana. The United States argued for a more specific equivalent, saying that if they were to give France *freely* that for which England had paid, France would be enjoying a treatment more favored than that of the most-favored-nation. This was the position held by Mr. Adams, President Monroe, and Mr. Gallatin, whose notes have been repeatedly quoted by United States Secretaries.

> It is true that the terms of the eighth article are positive and unconditional; but it will readily be perceived that the condition, though not expressed in the article, is inherent in the advantage claimed under it. If British vessels enjoyed, in the ports of Louisiana, any gratuitous favor, undoubtedly French vessels would, by the terms of the article, be entitled to the same.[5]
>
> But the allowance of the same privileges * * * to a nation which makes no compensation, that have been conceded to another nation for compensation, instead of maintaining, destroys that equality * * * which the most-favored-nation clause was intended to secure. It concedes for nothing to one friendly nation what the other gets only for a price.[6]

To M. Visser, this argument appears beside the point. He fails, however, to show conclusively just how it is so. Although it is true that "if, on examination, it appears that the third nation possesses a certain favored treatment, it matters little to others in what manner the third has obtained it,"[7] this does not make a breach in the soundness of the general contention of the United States. The whole difference may finally be sifted down to a distinction between the two views as to what constitutes "a

[5] J. Q. Adams, Dec. 23, 1817. Am. St. Pap., For. Rel., V, 152.
[6] Mr. Sherman to Mr. Buchanan, Jan. 11, 1898. Moore, *op. cit.*, V, 278.
[7] Visser, *op. cit.*, 273.

favor."[8] It is this difference of opinion which causes M. Visser to characterize the American argument as a "jeu de mots."[9]

In 1821, Mr. Monroe worded our doctrine clearly in his message to Congress. In 1823 Mr. Gallatin stated expressly that in our view the extension of favors to a third party is dependent upon the giving of an equivalent in compensation. This was again stated by Mr. Livingston in 1832. It was repeated and explained by Attorney General Cushing in 1853, and by Secretary Frelinghuysen in 1884, and by Secretary Sherman in 1888.

The treaty of the United States with Colombia, Oct. 3, 1824, provided that advantages given by either nation to a third party should be extended to the co-contractant, "freely if the concession was freely made," upon "compensation if the concession was conditional." Later the United States claimed the right to certain advantages which Central America was enjoying under a treaty with Colombia. When the Colombian government pointed out that its treaty with Central America was made upon a reciprocal basis, the United States conceded that its claim was unwarranted, and proceeded to arrange to grant to Colombia an equivalent for the advantages which were demanded.

The treaty of May 1, 1828, between the United States and Prussia, under the provisions of which Germany has made repeated claims against the United States, contained ten articles on the subject of reciprocal commercial relations. Article IX specifies that any favor granted to a third nation by either of the contracting powers shall immediately become common to the other, but adds the conditional clause. A simple illustration of the rights which Germany has claimed by virtue of this most-favored-nation clause is that made in 1894, that German salt should be allowed to enter ports of the United States, duty free. At the same time American salt was subject to duty in the ports of Germany. Secretary Olney answered that the position of the German government was absolutely untenable; that the principle the United States has regularly maintained was that of reciprocity; and that this position had already been acquiesced in by both Germany and Great Britain.[10]

[8] *Cf.* Barclay, Problems of International Diplomacy, 138 ff.
[9] *Cf.* Visser, *op. cit.*, 273, and Caravetta, *op. cit.*, 99.
[10] *Cf. infra*, chapter VIII.

When Austria, under the treaty of August 27, 1829, claimed that her wines should enter the United States at the same rate as did the French wines under the treaty of 1831, the United States government pointed out the difference between favors freely granted and reciprocal advantages, and at the same time suggested that no nation intends to bind itself by a condition which will render it unable to make further treaties, a fair interpretation of the most-favored-nation clause being, that, "if the duties were lessened in favor of any other nation, the contracting parties should obtain a like reduction for the same equivalent."[11] The United States has carefully avoided placing itself in a position where its liberty as regards future negotiation will be restricted or where other nations shall enjoy privileges in trading with us which we do not enjoy in return.[12]

After the conclusion of the reciprocity treaty of the United States with France, May 28, 1898, the Swiss demanded for Swiss imports into the United States the same concessions made to France. Their claim was based upon the treaty between the United States and Switzerland of November 25, 1850, which provided reciprocal most-favored-nation treatment in all that relates to importation, exportation, and transit, and that no favors in commerce should be granted by either to a third nation which should not immediately be enjoyed by the other, etc. It was shown that there was no conditional clause in this treaty and that by the understanding between the negotiators Switzerland had been given a "full and unlimited guarantee of the fullest most-favored-nation treatment." Secretary Hay, having examined the original correspondence, and having become satisfied that the American plenipotentiary Mr. Mann had agreed at the time of the negotiation that "no limitation should be attached to the most-favored-nation clause" and had accepted the interpretation of the Swiss government, declared that "both justice and honor require that the common understanding of the high contracting parties at the time of the executing of the treaty

[11] Moore, *op. cit.*, V, 261.

[12] *Cf.* Mr. Fish's refusal to make a treaty with Argentine for a fixed scale of duties, 1869, Moore, *op. cit.*, V, 262; the action of the United States when unexpected consequences followed the making of the treaty with Belgium of July 17, 1858 (*Ib.*, 262-263).

should be carried into effect," although this formed an exception to the otherwise uniform policy of the United States. "Should this government continue to give to Swiss products gratuitously all advantages which other countries acquire from an equivalent compensation, it would expose itself to just reproaches from other nations for exceptional favoritism. We desire that our friendly international policy should be maintained in its uniform application to all our commercial relations." The customs officers were instructed to extend to imports from Switzerland the same rates imposed upon similar French goods under the recent agreement. Germany and other states soon claimed the same treatment. On March 23, 1899, the United States gave notice of its intention to stop the operation of the articles in question in the Swiss Treaty and they ceased to have effect March 23, 1900.[13]

The Swiss in return for this, although the United States was in no way discriminating against them, applied their maximum tariff to imports from the United States. In 1906, when the new Swiss tariff went into effect, a basis for reciprocally advantageous treatment was arrived at, but without the formality of a treaty.

The position of the United States both as regards the regular interpretation and in extraordinary cases was thoroughly set forth in the diplomatic correspondence which followed the making of the treaty with Hawaii, January 30, 1875. In this, a treaty of strict reciprocity and unusual favors, it was stipulated that, in consideration of very material advantages in return, each country would admit certain articles from the other, duty free (articles I and II), and that no other nation should have the same privileges in Hawaii as the United States, nor would Hawaii make treaties with any giving them such (article IV). The English government protested.[14] England had an agreement with Hawaii (Treaty, July 10, 1851), that neither country would charge higher duties upon articles from the other than upon the same articles from any third nation. It has been usual for United States diplomats, to say that, as between two states

[13] U. S. For. Rel., 1899, 740-748, 753-757. Moore, *op cit.*, V, 285.

[14] Sweden, Belgium, and Holland also protested under treaties of July 1, 1852, Oct. 4, 1862, and Oct. 16, 1862, respectively.

which have a most-favored-nation treaty, each may demand and secure favors given by the other to a third, providing it, the second, will grant to the first concessions equivalent to those granted by the third. But under the provisions of this treaty, Hawaii was unable to extend even this right to England, so it appears that in order for her to keep her treaty obligations with the United States it was necessary for her to break her promise to England and to establish an effective discrimination against English and other goods. From this fact it might seem that M. Visser's suggestion, that the action of the United States in this case was not in agreement with the doctrine which it maintains, is correct. But the case was an exceptional one. Not only did the United States hold that "the concession of these privileges to the United States can not form the basis for a claim to like privileges under the parity clause of the ordinary form of treaty, as such special privileges were given in return for special valuable considerations," but it considered this as, for geographical and political reasons, a special and extraordinary case. This view was certainly justified, and it was soon so recognized by Great Britain. In the arrangement between Hawaii and Germany, 1878, it was specified that the special advantages granted to the United States should not be invoked as a precedent for treatment of Germany.[15] The Hawaiian case was held exceptional in a very clearly worded decision in the United States Supreme Court, 1887.[16] In this case, in which Denmark relied upon the most-favored-nation clause in her treaty of April 26, 1826, the Supreme Court held:

> These stipulations * * * do not cover concessions like these made to the Hawaiian Islands for valuable considerations. They were pledges * * * that there should be no discrimination * * * in favor of goods of like character imported from other countries * * *. They were not intended to interfere with special arrangements with other countries founded upon a concession or special privileges.[17]

[15] See U. S. For. Rel., 1878, 382-383, 403, 405.
[16] Bartram *v.* Robertson, 1887, 122 U. S. 116.
[17] See also U. S. For. Rel., 1881, 622 ff; and Herod, *op. cit.*, 116 ff.

In this connection it is interesting to turn to the treaty between the United States and Tonga, Oct. 2, 1886. In article II, after stipulations for most-favored-nation treatment, appears the following clause:

> it being understood that the Parties hereto affirm the principle of the law of nations that no privilege granted for an equivalent or on account of propinquity or other special considerations comes under the stipulations herein contained as to the most-favored-nations.

This was doubtless inserted on account of the difficulties which had arisen over the Hawaiian treaty.[18]

The following case suggests a decided inconsistency on the part of the United States. In the treaty between the United States and Prussia, 1828, referred to above, article V reads: "No higher or other duties shall be imposed on the importation into" either of any article the produce or manufacture of the other "than are or shall be payable on the like article being the produce or manufacture of any other foreign country * * * ." Article IX reads: "If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely, where it is freely granted * * * or on yielding the same compensation, when the grant is conditional." To Germany's contention that article V is the regulating factor, the United States has repeatedly answered that the conditions of article IX have a modifying effect on article V and that only in return for an equivalent can concessions granted a third nation on a reciprocal basis be granted to the second. Now in a treaty between the United States and Hayti, November 3, 1864, article II provided that favors in commerce and navigation which either had granted or should grant to a third party should extend "in identity of cases and circumstances" to the other; "gratuitously if * * * gratuitous; or * * * for compensation if * * * conditional." Article IX provided: "* * * no higher or other duties upon the tonnage or cargo of the vessels" of one shall be levied in the ports of the other

[18] See Snow: American Diplomacy, 176. Contrast with this the treaty between Great Britain and Tonga, Nov. 29, 1879, art. II.

than are levied or collected on the vessels of the most-favored-nation. July 31, 1900, Hayti made a treaty with France which was evidently reciprocal in its nature, France granting Hayti certain privileges in return for which Hayti reduced the tonnage dues paid by French sailing vessels and the dues on merchandise landed from them, if of French origin. The United States government at once demanded the same rights for American vessels under article IX of the treaty of 1864. The Haytian government invoked the application of article II. The United States government answered that "Article IX is quite independent of article II, and creates absolute rights which this government can not fail to insist upon." The correspondence indicates that the American officials were decidedly out of patience with Hayti, and their communications, unfortunately, do not indicate clearly the line of argument by which they maintain this position.[19] Unless some special significance can be attached to the phrase "in identity of cases and circumstances" in article II, or unless the United States can point out some particular circumstance whereby the grant made by Hayti to France was "freely made" rather than a return for compensation, it is difficult to arrive at any other conclusion than that this forms an arbitrary exception to the practice of the United States.

Another case in which the action of the United States appears open to criticism is that of the treatment accorded to Colombia under the Act of October 1, 1890. This Act admitted certain articles to the United States duty free, but allowed the President, if he considered the duties of any country reciprocally unequal, to suspend the free list upon goods of such country. After the failure of attempts to negotiate a reciprocity treaty with Colombia, the President, March 15, 1892, suspended the free list on certain products of Colombia. We had made reciprocity arrangements with four European and six South and Central American countries, but at the same time goods from Mexico and Argentina similar to the products in question were enjoying, gratuitously, it seems, the advantages of the free list. Colombia, relying upon her favored-nation-clause,

[19] U. S. For. Rel., 1901, 278-279.

protested. To the insistent and fiery notes of the Colombian Minister, the Department of State replied in a lengthy correspondence which contains excellent suggestions as to diplomatic "good form" but fails apparently to answer the logic of the Colombians or to analyze to any extent the justice of their demands.

Mr. Blaine's assertion to Mr. Hurtado that "the law cited [the Tariff Act of 1890] applies the same treatment to all countries whose tariffs are found by the President to be unusual and unreasonable" does not altogether meet the question involved.

At the same time, the practice of other nations presents instances of inconsistencies, though in no case are these sufficient to disestablish the regularity of their interpretations. In 1885, under the guidance of Bismarck, who asserted that the relations of Germany and the United States were on the basis of the most-favored-nation, the Bundesrat expressly included the United States in an ordinance granting to the most-favored-nations the lower duties conceded to imports of rye from Spain; but in 1883, in a similar ordinance extending to most-favored nations certain concessions recently granted to Spain and Italy, the United States had not been included. In 1891, Germany negotiated a series of treaties with European countries for reciprocal reductions of import duties. To have been consistent with the principle advocated in 1885, Germany should have extended to the United States the reduced duties granted to various European countries. This she did not do. The Saratoga Convention of August 22, 1891, was based on reciprocity and was, in character, a bargain in return for concessions.[20]

[20] See Stone: Most-favored-nation relations between Germany and the United States, N. Am. Rev., 1906, 182: 433-445. See chapter VIII.

CHAPTER V

ENGLISH PRACTICE AND INTERPRETATION: THE UNCONDITIONAL CLAUSE

England has been as consistent in maintaining that the clause is absolute as has the United States in its policy. In 1884, Mr. Frelinghuysen said of the English position: "The English contention has hitherto been, under the most-favored-nation clause, * * * that it is absolute, and that even when Japan may bargain with any power to give it a favor for an equivalent the favor must be granted to England without equivalent. The Japanese contention is the reverse of this * * *" *i. e.*, in agreement with that of the United States.[1]

In 1885, Earl Granville wrote:

> From this [the American] interpretation, Her Majesty's government entirely and emphatically dissent. The most-favored-nation clause has now become the most valuable part of the system of commercial treaties, and exists between almost all the nations of the earth. It leads more than any other stipulation to simplicity of tariffs and to ever-increased freedom of trade; while the system now proposed would lead countries to seek exclusive markets and would thus fetter instead of liberating trade. It is moreover obvious that the interpretation now put forward [just that which the United States has *always* put forward] would nullify the most-favored-nation clause; for any country, say France, though bound by the most-favored-nation clause in her treaty with Belgium, might make treaties with any other country involving reductions of duties on both sides, and, by merely inserting the statement that these were

[1] Mr. Frelinghuysen to Mr. Bingham, June 11, 1884, MS. Inst. Japan, III, 253. Moore, *op. cit.*, V. 267.

granted reciprocally and for a consideration, might yet refuse to grant them to Belgium unless the latter granted what France might consider an equivalent. Such a system would press most hardly on those nations which have already reformed their tariffs and have not an equivalent concession to offer, and therefore Great Britain, which has reformed her tariff, is most deeply interested in resisting it.[2]

This last sentence contains within the compass of its few words the key to the English position and the explanation of the English interpretation. The English have been true to these principles, although their practice like that of the United States has at times made exceptions. There have been more cases in which the English have used the conditional form of the clause than cases in which the United States has used the unconditional.

English treaties have been, however, as a rule, both in wording and in interpretation, unmodified. The purport of their most-favored-nation provision is in general, that "in all matters and regulations of trade and navigation, each of the high contracting parties will treat the other upon the footing of the most-favored-nation."[3]

A favorite form of the clause in English treaties, found constantly recurring, often in identical form, sometimes with slight variations of wording, is the following: "The contracting parties agree that, in all matters relating to commerce and navigation, any privilege, favor, or immunity whatever, which either * * * has *actually* granted or may hereafter grant to the subjects or citizens of any other state shall be extended immediately and unconditionally to the subjects or citizens of the other contracting party; it being their intention that the trade and navigation of each country shall be placed, in all respects,

[2] Earl Granville to Mr. West, Feb. 12, 1885. Parl. Pap., Commercial, No. 4 (1885), 21-22, Moore, *op. cit.*, V, 270-271.

[3] Treaty between Great Britain and Sweden-Norway, March 18, 1826, art. IX. In the treaty between England and France, Jan. 26, 1826, art. IV provides: "It is mutually agreed between the high contracting parties that, in the intercourse of navigation between their two countries, the vessels of any third power shall in no case obtain more favorable conditions than those stipulated in the present convention in favor of British and French vessels."

by the other on the footing of the most-favored-nation."[4] Another form found repeatedly in English treaties in common with those of other nations reads: "No higher or other duties," or "no higher or other import * * * or export duties" shall be paid on the goods of one country in the territories of the other than are payable on like goods of other countries.

Earlier British treaties simply stipulated for "reciprocal liberty of commerce,"[5] or "reciprocal freedom of commerce."[6]

The unconditional most-favored-nation clause was without exception the form used in British treaties in the eighteenth century, but, while this was the rule for treaties of the earlier period, and while the unconditional clause occurs in all the English treaties now in force, the use of the conditional form was by no means foreign to English practice during the first half of the nineteenth century, the period in which the American principle of reciprocity was gaining strength. Instances of this deviation will be given in the following chapter.

A review of the circumstances which have attended the regular occurrence of the clause in modern English treaties furnishes an object lesson in both the advantages and disadvantages which attend its use. Its extensive and emphasized employment, with a very definite and determined object, became one of the leading features of English commercial politics after the making of the Cobden treaty (1860). As the practical champion of commercial liberalism, and as the advocate of universal free trade, England found the most-favored-nation clause a necessary and invaluable instrument. It soon became evident that although the English were enjoying all the benefits which France extended to the trade and commerce of every other nation, yet the balance of advantages under that treaty was in favor of France. The

[4] Treaty between Great Britain and Paraguay, Oct. 16, 1834, art. II. *Cf.* also treaties of Great Britain with Honduras, Jan 21, 1887; France, Feb. 28, 1882; Mexico, Nov. 27, 1888; Japan, July 16, 1894.

[5] Treaty between United States and Great Britain, July 3, 1815, art. I.

[6] Great Britain and Venezuela, April 18, 1825, art. II; and Great Britain and Russia, Jan. 12, 1859, art. I. In the convention between Great Britain and the United States, March 2, 1899, and Jan. 13, 1902, art. V, appears the following: "In all that concerns the right of disposing of every kind of property, real and personal, citizens or subjects of each * * * shall in the dominions of the other enjoy the rights which are or may be accorded to the subjects or citizens of the most-favored-nation."

influence of the new conditions upon British policy is apparent in the treaties which followed with Belgium, July 23, 1863, with Italy, August 6, 1863, and with Prussia and the Zollverein May 30, 1865. In the last-named treaty, England acquired a position more favored than that of France, in that most-favored-nation treatment was extended to the British colonies and all other English possessions. Between 1860 and 1866, England made other most-favored-nation treaties with Turkey, Salvador, Austria and Colombia. After the change occasioned in Anglo-French commercial relations by the temporary change in French policy, in 1872, a new treaty was made between the two nations, July 23, 1873. Treaties were also made with the Bey of Tunis, July 19, 1875, and with Austria, November 26, 1877. In these treaties the English invariably insisted upon the insertion of the most-favored-nation clause.[7]

In the pursuit of this policy Great Britain generalized the concessions made to France in 1860. It gave, regardless of reciprocal concessions, to the whole circle of commercial states the tariff concessions which France had purchased. The result was that England, giving her advantages away freely, was unable to make treaties with Spain and Portugal, which countries cheerfully profited by the general lowering of the English tariff on wines, but demanded that if they were to make any concession to Great Britain a special concession must be made them, and, such not being forthcoming, instituted a differential against England.

The convention made between England and France, February 28, 1882, guaranteed to "goods of English origin or manufacture," with the exception of "colonial produce," most-favored-nation treatment. On May 22, 1882, England made a most-favored-nation treaty with Portugal, the latter reserving the right to concede special advantages to Brazil. The treaty made with Italy, June 15, 1883, was based entirely on most-favored-nation treatment.[8] England also won, against much opposi-

[7] In 1907, Jan. 1, Great Britain had treaties containing the most-favored-nation clause with no less than forty-six different countries, and the clause appeared in no less than eighty-three British treaties, conventions and agreements See Parl. Pap., Commercial No. 3 (1907), (cd. 3395).

[8] U. S. For. Rel., 1878, 402.

tion, a most-favored-nation treaty with Spain, April 26, 1886, in which the expressed advantages were extended to the colonies of both contracting parties. Between 1880 and 1890 other treaties, too, of the same general character were made with Servia, Roumania, Ecuador, the Transvaal, Montenegro, the Kongo, Uruguay, Egypt, Mexico, Paraguay, Honduras, and Greece. Thus, in the prosecution of this policy, England achieved many advantages. She was giving very little—for how much could she, with her free trade policy, concede?—and for this little she was getting much.[9]

She had much reason to be flushed with the success of her commercial policy; yet, both free trade and the unlimited interpretation of the most-favored-nation clause were destined to cause England no little inconvenience.

Lord Clarendon appears to have yielded to the American interpretation in 1856. During the discussion over the Hawaii-United States treaty of 1875, it was discovered that he had informed the Hawaiian government in 1856 with reference to the unratified reciprocity treaty which had been signed at Washington in the preceding year, that, "as the advantages conceded to the United States by the Sandwich Islands are expressly stated to be given in consideration, and as an equivalent for, certain reciprocal concessions on the part of the United States, Great Britain can not as a matter of right, claim the same advantages for her trade under the strict letter of the treaty of 1851" [Great Britain-Hawaii].

Lord Derby, in an instruction to the British representative at Honolulu, Jan. 25, 1878, said that "only under the peculiar circumstances of the case" could the British government agree to the differential treatment of British goods by Hawaii [in favor of the United States].[10]

In 1884, Lord Granville demanded that the advantages which the United States was conceding to Hawaii and some states of South America, especially in regard to the importation of sugar, be extended to the British West Indies. This demand was based

[9] To this treaty there was annexed a protocol providing for arbitration in case of difficulty over interpretation. *Cf.* Smart, The Return to Protection, 130.

[10] U. S. For. Rel., 1879, 512. Moore, V, 264-5.

on the most-favored-nation clause (article II) in the treaty between the United States and Great Britain of July 3, 1815.[11] The United States answered that the clause should not and could not be interpreted in this sense.

With the rise of the sugar-bounties question, England found her attitude concerning countervailing duties inconsistent with her interpretation of the most-favored-nation clause. This question caused considerable agitation in England and in several of the colonies, and it was even urged that the government be given freedom to use, when circumstances warranted, some of the instruments of protection.

The preferential tariff movement led to a propaganda in the British colonies, especially in Canada, against the clause of the most-favored-nation. This agitation soon centered in the Imperial Federation League. The chief grievance against the clause arose from the fact that it prevented the colonists from conceding special advantages, which they desired, to their trade with the mother country. The clause operated so as to extend at once such favors as were granted to the latter, to other nations. The operation of the clause appears to have extended also to trade between the colonies and thus to have been altogether an obstacle to preferential treatment. In 1890 the Canadians made a strenuous attack upon the clause and voted that it be not inserted in future treaties. The Canadians regarded it as all-important to their trade that this obstacle be removed, and they presented memorials to that effect to the crown in 1893. The Imperial Government in its reply emphasized the importance of the clause in maintaining British commercial independence. Recognizing its failure in the attempt to convert the world to the principles of free trade, the English government regarded the most-favored-nation clause as an instrument by means of which England could "so to speak, enjoy indirectly the benefits and advantages enjoyed by other states."[12]

Canada passed, April 23, 1897, a tariff act of which article XVII read:

[11] "No higher or other duties * * * on the imports or exports of any articles the growth, produce, or manufacture of the territories of one * * * into one from the other * * * than payable on the like articles * * * of any other foreign country."

[12] Cavaretta, *op. cit.*, 125.

"When the customs tariff of any country admits the products of Canada on terms which on the whole are as favorable to Canada as the terms of the reciprocal tariff referred to are to the countries to which it may apply, articles which are the growth, produce or manufacture of such country, when imported directly therefrom, may then be entered for duty or taken out of warehouse for consumption in Canada at the reduced rates of duty provided in the reciprocal tariff set for them in schedule D."

It was urged against this law that it conflicted with the English treaties of commerce with Belgium, July 23, 1862, and with Prussia, May 30, 1865, which provided that the products of those countries should not be subjected in English colonies to higher duties than the produce of the United Kingdom or any other country of like kind. The Canadian government argued, relying upon the American example, that there would be no unequal treatment, because Belgium and Germany could obtain the same treatment as England upon satisfying the same conditions. In view of the wording of the English treaties, and of the policy of England with regard to these treaties, this argument seems unsupportable, as neither coincides with, and therefore neither can depend upon, the principles upon which the United States practice is based.

In the colonial conference of 1897 the Premiers agreed that the admission of other nations to the benefits of the preferential treatment could not be allowed. Mr. Chamberlain recommended the denunciation of all treaties which "hampered" closer trade relations between Great Britain and her colonies. In July, 1897, the Belgian and German treaties were abrogated by the Imperial Government so that the provisions of the Canadian tariff law might go into effect. Other nations then recognized the contention that arrangements made between England and Canada came under a special class as colonial arrangements, and refrained from demanding similar treatment under the most-favored-nation clauses in their treaties. At the same time it is necessary to notice the fact that Canadian tariff policy is autonomous, which takes Canadian arrangements out of the class of ordinary colonial arrangements.

Since 1898 Germany has excluded Canada from the most-favored-nation treatment which she accords to Great Britain and most British possessions. What amounts to a tariff war has been waged between the two countries for more than ten years. The Canadian tariff of 1907 and the subsequent Franco-Canadian commercial convention has served on the one hand to increase the irritation of the Germans and on the other to make them very solicitous to end the difficulty. Steps are being taken to arrive at an agreement.

The free-trade example of England failed to bring about the cosmopolitanism which had been the cry of the Cobdenites. Universal free trade was not to be realized with a bound.

First came the "return to protection", Germany and France leading in the movement, and then the "increase of protection", Germany being the leader. The movement of recent years, the revision of tariffs following the German example and the making of tariff-treaties subsequent, have, to be sure, resulted in certain reductions, but have resulted on the whole in a very appreciable net increase in the general schedules. This means a building up, not a lowering, of protective walls, a distinct indication that modern statesmen are less than ever ready to surrender to free trade principles. Free trade may come—as may perhaps universal disarmament—as a result rather than as a cause of cosmopolitanism, but in the meantime the pioneer finds it hard indeed to be consistent, to defend and to maintain his commercial position without using weapons similar to those which his competitors employ.[18]

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[18] "I want to point out to you, what I observe is that while A is very anxious to get a favor of B, and B is anxious to get a favor of C, nobody cares two straws about getting the commercial favor of Great Britain. What is the reason of this? It is that in this great battle Great Britain has deliberately stripped herself of the armor of weapons by which the battle had to be fought. The weapon with which they all fight is admission to their own markets. * * * If you intend, in this conflict of commercial treaties, to hold your own, you must be prepared, if need be, to inflict upon the nations which injure you the penalty which is in your hands, that of refusing them access to your markets." Lord Salisbury, speech at Hastings, May 18, 1902.

The final report of the English tariff commission is expected soon. "It is expected to take advance ground in behalf of Chamberlain's preferential program." * * * "It is the opinion of many confident observers" [that England is being driven] * * * "inevitably back to the repudiated protective system." Ogg, F. A.: European Tariff Laws and Policies, Rev. of Rev., 1909, 39: 427-432.

It is evident, not only from the mass of writing upon the subject, but from the action of the government, that the English are undergoing a change of sentiment as concerns commercial policy, and by no means the least among the indications of this is the attitude of the English Foreign Office in the first few years of this century toward English obligations under the most-favored-nation clause.

CHAPTER VI

EUROPEAN AND WORLD PRACTICE: A BACKGROUND FOR INTERPRETATION

Before turning to consider the views of several of the leading writers who have discussed the theory and practice of the most-favored-nation clause, it will be well to get clearly in mind certain circumstances which have attended its use in different periods. A knowledge of the time when a treaty was made will be found to be absolutely essential in many cases if we wish to arrive at a proper interpretation of some of its clauses.[1]

In the first place, and of primary importance, most-favored-nation treatment has now, and had in the eighteenth century, a different meaning in European policy from that which attached to it between 1825 and 1860. While European countries now give the clause a form and an interpretation corresponding approximately to that in vogue in the eighteenth century, the universalizing of favors, which that old form might be expected to entail, is largely modified by the mechanism of modern tariff policy.

We have already indicated that the eighteenth century was that of the unconditional clause, and we have noted that the United States in 1778 entered the arena of world-commerce with the principle of opening her ports and guaranteeing equal treatment to all comers—upon a basis of reciprocity. This policy, which did not preclude the granting of special privileges, was clearly a policy of *do ut des*, and it has been indicated that it was such by the use of the conditional form of the clauses. Among the states which made use of the clause in that century, Great Britain led in the number of favored nation treaties, while the United States came second.

[1] For an exhaustive study from this point of view, Dr. Glier's Die Meistbegünstigungsklausel is invaluable.

In the first quarter of the nineteenth century the tide set strongly toward the general adoption of a policy of freedom of commerce. At the same time the American principle of "compensations" was written into a widening circle of treaties wherein this extension of commercial privileges was regulated on a basis of reciprocity. The unconditional form of the most-favored-nation clause began to be superseded by the conditional. The first treaty between European states in which there appeared the form originated by the United States was that between Great Britain and Portugal, Feb. 19, 1810. In this treaty, article II, we find the guarantee that any favor, etc., granted by either of the contracting parties to a third nation shall be accorded to the other

> gratuitously if the concession in favor of that other state shall have been gratuitous, and on giving, *quam proxime*, the same compensation or equivalent, in case the concession shall have been conditional.

In 1824 the United States made a treaty with Colombia which marks the introduction of the clause to South American practice. This was followed in 1825 by a similar treaty of the United States with the Central American Confederation,—and thenceforth for twenty-five years South and Central American treaties regularly contained the conditional form.

Of the important treaties made between 1826 and 1830, numbering about a score, only about one-fourth contain the unconditional form of the clause. Among others containing the conditional form, on the basis of reciprocity, we find treaties between: the United States and Denmark, April 26, 1826; the Hanse Cities, Nov. 27, 1827; Prussia, May 1, 1828; Brazil, Dec. 12, 1828; Austria, Aug. 27, 1829; Brazil and the Hanse Cities, Nov. 27, 1827; Prussia, April 18, 1828; Colombia and the Netherlands, May 1, 1829. Five of these were still in force at the end of the century.

Although the point of the wedge had entered, European countries still held in their treaties *inter se* to the unconditional form of the clause until about 1830. Then, as international trade was rapidly increasing, and as the influence of American commercial practice began to be felt, the principle of reciprocity

was eagerly seized upon in Europe, and a whole series of treaties upon this basis ensued. The period from 1830 to 1859 was outspokenly a reciprocity period. In treaties the unconditional form of the most-favored-nation clause appeared more and more rarely, and where it did appear its guarantee was usually only unilateral. England forms somewhat of an exception. She was conservative, and her treaties exhibit a tendency to retain the unconditional clause, while some of the northern states also held to that form. But even England did not abstain altogether from the use of the conditional. We have cited the treaty of 1810 with Portugal. To this may be added a treaty of July 3, 1838, with Austria, in which we find

> "leurs majestés—s'engagent réciproquement á n'accorder aucunes faveurs, priviléges [etc. to a third state] qui ne soient en même temps accordés [etc. to the co-contractant] gratuitement, si la concession—a été gratuite, ou en donnant, en autant qu'il sera possible, le même équivalent, dans le cas où la concession aura conditionnelle. (Article XI.)

In January, 1843, Great Britain made a treaty with Russia containing the same formula. The treaty with Liberia, Nov. 21, 1848,[2] contained the conditional form, and the same appears in treaties which Great Britain made between 1849 and 1853 with Costa Rica, Dominica, Peru, Hawaii, Sardinia, Ecuador, and Paraguay.[3]

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[2] Art. VII. "It is hereby agreed between them that any favor, privilege, or immunity whatever, in matters of commerce and navigation which either * * * has actually granted, or may hereafter grant, to the subjects or citizens of any other State, shall be extended to the subjects or citizens of the other * * * gratuitously, if the concession in favor of that other state shall have been gratuitous, or in return for a compensation as nearly as possible of proportionate value and effect, to be adjusted by mutual agreement, if the concession shall have been conditional."

[3] The treaty with Hawaii (1851), for instance, contains the guarantee of reciprocal treatment in the following form:

Article III. " * * * or in return for a compensation as nearly as possible of proportionate value and effect, to be adjusted by mutual agreement, if the concession has been conditional."

Contrast the form in this group of treaties with that contained in a treaty which Great Britain made with the American state, Nicaragua, on Feb. 11, 1860:

Article II. "The High Contracting Parties further engage that neither will grant any favor to any other nation in respect of commerce and navigation which shall not *immediately* become common to the other contracting party."

An examination of the treaties made in this period by Austria, Belgium, France, Holland, Portugal, Sardinia, Sicily, Spain, and the Zollverein, as well as those already mentioned, shows a large return of clauses in the conditional form with the definite stipulation that compensation must be made for privileges demanded. Moreover, an examination of commercial and tariff history shows that reciprocity was the guiding principle in the commercial relations of all western nations from 1825 to 1860. Thus Dr. Glier exhibits thirty-eight treaties of the German states of which the twenty-one made with American states all used the conditional form, while the seventeen with European states almost without exception stipulated in one form or another for the conditional treatment.[4]

It should be kept in mind that where most-favored-nation treatment is promised the guarantee usually occurs in double form, representing both the positive and the negative sides, the latter usually preceding the former. Upon the negative side it is promised that "no higher duties shall be imposed upon the products of either party in the territories of the other than are payable upon like products of any other foreign land." But this must be read in connection with the statement of the positive side which accompanies it; if either party makes special concessions to a third, the other shall be accorded the same—but (when the conditional form of the clause is used) only upon offering an equivalent for the compensation which was made by the third, in case there was a compensation. This qualifying clause appears in most of the treaties of the period under discussion. Furthermore, certain treaties which at first sight appear to have been unconditional, are found upon examination to have been modified and made conditional by supplementary conventions.[5] There are still a goodly number of

[4] "Hunderte von Verträgen sind abgeschlossen worden, in denen der Mitgenuss der von dritten Staaten gewährten Vergünstigungen von einer Gegenleistung abhängig gemacht war. Dies war von 1825–1860 weitaus die Regel." Glier, 16. See also p. 128. In this period, "In erster Linie waren es in Europa die heute im Deutschen Reich geeinten Staaten welche den Reziprocitätsgedanken pflegten * * * ." Glier, 123.

[5] *e. g.* Treaty between France and Liberia, April 17, 1852, supplemented by an agreement, April 21. See other French treaties.

treaties of that period in force, not American alone, but many European as well.[6]

While reciprocity was unquestionably in the ascendant, and while the conditional clause was generally adopted it would be wrong to infer that the unconditional form went entirely out of use. Most of the important states adopted, and made their treaties according to, the prevailing principle, yet the retention of the unconditional form of the favored-nation clause in many English treaties and in those of the northern states is not to be overlooked, while in the fifties we find this form reappearing in certain treaties of south-central Europe.[7] In 1850 Cavour began in Sardinia a commercial policy which led within the next two years to the making of eight treaties in which, in addition to the most-favored-nation clause, the important feature was that the tariff reductions to be made were specified. These were tariff treaties, which may be remembered when we think of the prominent place which treaties of that form have been given among the commercial instruments of the countries of Middle Europe in the last fifteen years. Belgium, Holland, and Sicily at once followed the example of Sardinia in the use of the tariff-treaty.

Between 1850 and 1865 the tariff policy of Europe underwent a complete transformation. In spite of the influence of such economists as List and Carey, protectionist principles and traditions were completely abandoned. The turning point is usually dated at the Cobden treaty between England and France, Jan. 23, 1860. There were precedents for this treaty in those of Great Britain with Sicily, April 29, 1845; the Sardinian treaties with Belgium, Switzerland, and Austria, 1851, and the Belgian treaty with Holland, Sept. 20, 1851. In a treaty which Russia made with France, June 2–14, 1857, we find most-favored-nation treatment in a conditional clause (article XIV); but in the treaty which Russia concluded with Great Britain, Jan. 12, 1859, the clause appears (article X) in the unconditional form.

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[6] United States treaties of that period still in force include those with Argentina, Austria, Bolivia, Colombia, Costa Rica, Denmark, Great Britain, Norway, Persia, Russia, Siam, Sweden, Turkey, and Zanzibar.

[7] Examples: Great Britain-Holland, Oct. 27, 1837; Sardinia-Switzerland, June 8, 1851; Zollverein-Austria, Feb. 19, 1853.

This treaty contains no hint of the compensation principle. Yet Russia was an outspoken reciprocity state. The inference as regards the British attitude and influence is obvious.

In the Cobden treaty, article XIX, each of the high contracting parties agrees to give the other every favor, etc., on the articles "mentioned in the present treaty" which it may grant to any third power. This partial statement was supplemented by the *real* and extensive most-favored-nation clause which appeared in the complementary convention of Nov. 16, 1860, in which article V reads:

> Each of the High Contracting Powers engages to extend to the other any favor, any privilege or diminution of tariff which either of them may grant to a third Power in regard to the importation of goods *whether mentioned or not mentioned in the treaty of 23rd of January, 1860.*

No suggestion is made of any compensation.

England was not alone in abandoning the old, and setting the seal of approval upon the new commercial policy. European nations turned enthusiastically toward the idea of removing the artificial restrictions by which their commercial intercourse was regulated. The most-favored-nation clause could be, it was seen, a most efficient instrument in promoting the desired end. As a simple distributive instrument, it would operate, in the unconditional form, by automatically extending whatever concessions might be made to one to other nations, to break down tariff walls gradually and without shock. Immediately all Europe set to remaking treaties, taking as a model for the new agreements the Cobden treaty. The chief characteristic of the new treaties was the insertion of the most-favored-nation clause, without exception, and in the unconditional form. The treaties were shorter than had previously been the rule, and their provisions were limited more strictly to the economic phases of commercial relations. We have mentioned elsewhere the English treaties which followed the Cobden treaty. Belgium at once made treaties (between 1860 and 1870) with France, Great Britain, Switzerland, Italy, Lübeck, Holland, Hamburg, Denmark, Norway-Sweden, the Zollverein, Austria, and Spain. Dr. Glier says of Belgium that it was the most determined champion of the

general and unconditional most-favored-nation treatment in all Europe. Italy was also enthusiastic, making treaties in the decade after 1860 with Sweden, France, Great Britain, the Zollverein, Austria, Switzerland and Spain. France made treaties with Belgium, Italy, the Zollverein, Spain, Austria, and Portugal. How the other nations of Europe followed suit may be seen by observing their names in the above groups.

Thus in the free-trade movement we find the use of the conditional clause practically given up. When the leading states of the Continent subsequently returned, after 1875, to the principles and practice of protection no return was made to the conditional clause in the treaties. That this return did not take place can best be explained by the fact of the adoption of "maximum-and-minimum" and "conventional" tariff systems, and the correlated use of the tariff-treaty. However that may be, Europe may be said to have definitely given up the conditional form of the clause in 1860, and since then, in spite of inconveniences which have been felt, European states have consistently employed the unconditional form and insisted upon the unconditional construction. They hold that all favors extended to third states are due at once and without return to states having favored-nation relations with the grantor state. It remains to be considered to what extent and with what modifications the first point may be accepted. With regard to the second, it must be conceded for the majority of European treaties which have been made since 1860. But a great mistake has been made by many governments and by many writers in that they have overlooked the historical setting which is essential, and, ignoring this, have attempted to extend what is a legitimate interpretation of a certain large group of treaties and to make that interpretation apply alike and at large to most-favored-nation treaties in general.

While European practice changed in the manner indicated, first from the unconditional to the conditional, and then back to the uniform use of the unconditional, the United States maintained, throughout, the form and construction of the conditional. South and Central American practice has varied. In some of the early South American treaties the unconditional form was

used. Treaties of Brazil and other states appear before 1827 in which only the negative side of favored-nation treatment was specified. Treaties made by the United States with Colombia, 1824, and with the Central American Confederation, Brazil and Mexico in 1825, 1828, and 1832, contained the conditional form, and from then on the leading American states embraced this principle. Their treaties with the United States have regularly contained this form. And between 1830 and 1860 they made no exception to this principle in their dealings with European states. Reciprocity was at the basis of their commercial policies. Their guarantee that "no higher or other duties" would be charged applied, as it has done in treaties of the United States, to the general tariff. For special concessions, equivalents were demanded in return. Since 1860 South American practice presents a tendency to waver between the two forms, in the way characteristic of European practice in the period preceding. Numerous treaties of Venezuela, Argentina, Paraguay, Uruguay, and Peru with European countries contain the unconditional form. This may be readily accounted for by the policies of the latter. Mexico has used chiefly the unconditional form of the clause. The practice of reciprocity has, however, held firmly in the treaties of American states *inter se*, and in a majority of those made with European, Asiatic, and African states.

Japanese practice, since Japan assumed a position of equality with western treaty-making nations, has varied. The Japanese have been accused of adopting that interpretation which seemed expedient, now giving favored-nation guarantees a qualified meaning and again calling for the unconditional construction. Considering the fact that Japanese treaties have contained both forms of the clause it is difficult to see how divergence could be avoided in the matter of interpretation. The Japanese treaty with Denmark, Oct. 19, 1895, article XIV, contains the words "immediately and unconditionally." The same form occurs in treaties made in 1896 with Germany, April 4; Belgium, June 22; Holland, Sept. 8, and Switzerland, Nov. 10. At the same time the conditional form appears in treaties made just previously, with the United States, Nov. 22, 1894; with Peru, March 20, 1895, and with Brazil, Nov. 5, 1895. The fact that these two

different forms were used by Japan would seem to indicate one of two things: either the parties with whom the Japanese were negotiating in each instance dictated the form in which the clause should be written into the treaty, using of course that which was common to their own practice, without its being pointed out to the Japanese or without their being aware that there existed a difference in interpretation—a thing altogether unlikely; or, the Japanese, recognizing the distinction, knowingly adopted the one form with some and the other with other nations, and have subsequently, quite logically and discriminatingly, used one interpretation in dealing with one set of nations and another in dealing with the rest. In either case, the fact that they have recognized the difference and acted accordingly, makes the charge that they have now one and now another interpretation assume the nature of a compliment to their clearness of vision. Their action is to be condemned only if instances can be shown in which they have varied in the interpretation of a single form of the clause, to their own advantage.

To summarize: The United States, both as regards form and interpretation, has been a regular adherent of the conditional usage, with a few exceptions. Great Britain has regularly adhered to the unconditional, with, likewise, a few exceptions. The countries of Europe followed first the unconditional, then the conditional, and then again the unconditional. Those countries which have had commercial policies smacking of free trade have shown a preference throughout for the unconditional, while those countries which have been most consistently protectionist, like Russia, have favored the conditional. South American states have used first the unconditional, then the conditional, and then both. Japan has used both, the choice being determined by the usage of the country with which she was in each case contracting. Other Asiatic countries, and Turkey among European nations, have, so far, had acquaintance chiefly with the unilateral, and therefore, unconditional, form, with the advantages in the favor of the other party. Two facts stand out prominently; first, that various periods have witnessed a decided shifting of emphasis in commercial policy; second, that favored-nation usage has varied with some, and remained practically

constant with other nations. A third fact of striking importance is, that with all the changing in tariff policy and treaty form, the most-favored-nation clause has not only not lost ground, but has steadily become a more and more regular feature of commercial treaties. In the latest extensive treaty-making movement, that which busied the countries of central Europe after the passing of the German Tariff Act in 1902, the clause was inserted in every one of the new agreements. At the beginning of 1908, Great Britain had most-favored agreements with no less than forty-six countries, the clause appeared in forty-five treaties of Italy, the United States and Germany had favored-nation treaties with more than thirty countries each, Spain, France, and Japan with between twenty and thirty each, and several other countries were not far behind.

CHAPTER VII

INTERPRETATION: OPINIONS OF TREATISE WRITERS AND RULES

With the most-favored-nation clause occurring so universally, under so widely differing conditions, in a variety of forms, and in a veritable network of treaties—and while such great importance has attached to tariff systems and their administration, it is not surprising that problems of interpretation have been both numerous and complex. Two schools of interpretation have arisen as indicated in the paragraphs introductory to the history of the clause. The adherents of one school hold to the strict or literal, perhaps the more truly juristic, interpretation; those of the other insist upon the practical, or—as it seems to some—opportunist, but surely more truly economic, interpretation. The former school, consisting of nations which lean toward the use of the simple reciprocal form of the clause, refuses to admit the distinction which the latter—as represented by the United States—maintains between favors *granted gratuitously* and advantages given expressly *in return for some compensation.*

The interpretation of the clause must necessarily depend to a considerable extent upon the form in which it appears. This suggests that, while emphasizing the importance of the historical survey in attempting to determine the meaning of a given clause, the value of the inductive method is not to be ignored. Our examination at this point requires using both. The *unilateral,* and the *specialized reciprocal,* forms (I and II)[1] offer little ground for misinterpretation, and need not detain us here. Much of the controversy has centered about the *simple recipro-*

[1] *Cf.* classification *supra,* chapter II.

cal form (III) in which the high contracting parties agree that in all that concerns navigation and commerce, favors which either grants to any third state shall be granted to the co-contractant. In the controversy are also involved the *imperative and unconditional* (IV) and the *conditional or qualified reciprocal* (V) forms. Form IV adds to the guarantee carried in form III, that favors granted to a third party shall "immediately and unconditionally" be extended to the co-contractant. Form V adds that the favor is to be extended to the co-contractant "freely if the concession to the third party was freely made, or for the like or an equivalent compensation if the grant was conditional."

Now, does form III imply that favors granted to a third party shall be extended *at once* and *without compensation* to the second? Looking at the wording of form III alone it might seem that the favored nation has the right to demand at once the concessions made to the third. But, we notice, form IV contains the word "immediately," which is lacking in form III. We notice likewise that form V contains an express stipulation for a "compensation," while form III contains no such stipulation. Is III then to be assumed to be "unconditional?" Here again, turning to form IV, we find the word "unconditionally." This word does not appear in form III. Are we then to assume from this that form III is conditional, in antithesis to form IV, or are we to hold it unconditional, in antithesis to form V? There is one escape from the difficulty here presented: we may assume that since form III makes no condition it is unconditional, and from that we will be led to the conclusion that the word "unconditionally" is inserted in form IV as a matter of extra caution and for the sake of clearness. Shall we then accept the same reasoning with regard to the word "immediately," giving forms III and IV essentially the same meaning? It is obvious that the mere discussion of terms will not carry us to a conclusion.

Turning to the history of the clause and to the early assertions which were made concerning its character and purpose, we find that its original function was not to secure advantages but to insure against discrimination, and we find special empha-

sis laid upon the fact that it operated to abolish, instead of creating, inequalities (which must include advantages as well as disadvantages) in the world's markets.[2]

Mr. Herod's "Most-Favored-Nation Treatment" contains an excellent discussion of the simple reciprocal form, and of the imperative and unconditional form, applying Hall's rules for the interpretation of treaties.

> 3. When the words of a treaty fail to yield a plain and reasonable sense, they should be interpreted in such of the following ways as may be appropriate:
>
> a. By recourse to the general sense and spirit of the treaty as shown by the context of the incomplete, ambiguous, or obscure passages, or by the provisions of the instrument as a whole.
>
> b. By taking a reasonable instead of the literal sense of the word when the two senses do not agree.
>
> 4. Whenever, or in so far as, a state does not contract itself out of its fundamental legal rights by express language, a treaty must be so construed as to give effect to those rights.[3]

We may well exhibit with these the following from among the rules which Wharton gives for the interpretation of treaties:

> (6) —— "interpretation" gives the meaning of particular terms to be explained by local circumstances and by the idioms which the framers of the treaty had in mind. (7) If two meanings are admissible, that is to be preferred which the party proposing the clause knew at the time to be that which was held by the party accepting it.[4]

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[2] "Nur auf die Gleichstellung mit den anderen fremden Staaten, nicht auf die Besserstellung gab die Meistbegünstigungsklausel ein Anrecht." Kaufmann, *op. cit.*, 342. " * * * cette clause. dont l'effet est de 'généraliser immédiatement chacune des concessions du tarif conventionnel' soit un acheminement, vers le régime du libre échange absolu pour qu'elle soit approuvée par les amis de la liberté." Pradier-Fodéré, Traité de droit international public, IV, 399. *Cf.* Visser, *op. cit.*, 78; Von Melle, *op. cit.*, 207; Herod, *op. cit.*, 15-16, and note; Cavaretta, *op. cit.*, 93; Fontana-Russo, Trattato di Politica Commerciale, 593.

[3] Hall, International Law, 5th Edition, 338-339.

[4] Wharton, International Law Digest, section 133, II, 36, citing other authorities.

Mr. Herod argues as follows: Examining the treaties containing the simple reciprocal form of the clause, we find that the reciprocity is the foundation of all.[5] This being the case, it is natural to infer that reciprocity should be considered as the "foundation for the general covering clause which is to supply omissions and prevent future unfavorable discriminations. This inference becomes a certainty when examined in the light of [Hall's] rule 4. A literal interpretation of the clauses would deprive a state bound by it of one of its important attributes of sovereignty," that is, it would become a bar to the state's making further arrangements upon terms of reciprocity with other nations. Such restrictions only follow upon the consent of a nation itself. Only the insertion of the words "immediately and unconditionally" or their equivalents can justify the assumption that a nation has so bound itself. "The stipulations of conventions governing commercial relations of nations are based upon utility and reciprocity. Gratuitous concessions, taken in a literal sense, are unknown."[6]

With regard to the immediate and unconditional form of the clause Mr. Herod says:

> It has been urged that the phrase "shall immediately be enjoyed" places the clause in the category of the imperative form, and secures any favor whatever in the subjects of which it treats gratuitously and without condition. Unless supported by some other strong evidence, the claim cannot be sustained. "Immediately" refers to the self-executing nature of the clause and not to the conditions of enjoyment.
>
> The clause embodying the phrase "without any consultation or delay" lies in the doubtful ground between the simple reciprocal and the imperative form.

To secure beyond question the interpretation of an imperative and unconditional clause, it is essential that it contain the

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[5] "La réciprocité du traitement national et des avantages échangés est sans doute la base habituelle de cette sorte de traités; néanmoins on pourrait en citer dans lesquels les avantages respectivement stipulés sont loin de former un équivalent exact." Calvo, Droit international (Ed. 1896), III, 365-366.

[6] Herod, *op. cit.*, 9-12. See Am. St. Pap., For. Rel., V, 152, 890; I, 37; Whitney *v.* Robertson, 124 U. S. 190; 16 Op. Atty. Gen'l, 628.

words "unconditionally," "without equivalents," or the like.[7] In the light of our survey of favored-nation practice, certain qualifications may be suggested to some of these points. It is true that the principle of reciprocity is the foundation of commercial treaties, in that each party to a treaty aims to *get* something for what it *gives*. But the transaction may involve past present, or future favors. Agreeing in the inference that reciprocity should be considered as the "foundation for the covering clause"—it is still possible that if the treaty be regarded as a whole, the clause may be looked upon as guaranteeing an additional return, to whichever party may happen to profit by it, for the concessions which it has made in the text of the treaty. The giving of concession for concession, in the future, may or may not have been implied, according to the policy of the contracting parties. A literal interpretation becomes a bar to the making of further treaties upon a basis of reciprocity only in case the state bound is unwilling to generalize concessions made in subsequent treaties. Some states have avowedly and consistently opposed this practice, some followed a policy of making common to others the concessions which they make to one. Some states have done now the one and now the other. Mr. Herod's statement holds good for countries with a practice similar to that of the United States, but not for one in the position of Great Britain. Further, we see how that generalizing process is not only possible but highly practicable among states which have adopted the "conventional" tariff system, for there it is by means of this generalizing wrought by the most-favored-nation clause that the conventional schedule is made up. Again, the necessity for considering in what period a treaty was made becomes apparent. Without having done this, unconditional treatment may be read into a treaty which was really made under circumstances which warrant the assumption that the opposite was meant. It has been the tendency of late years for countries which formerly used the simple reciprocal form and which are avowed advocates of the unconditional interpretation to employ the fuller and more explicit form, IV, calling for the "immediate and unconditional" grant. This need not imply

[7] Herod, *op. cit.*, 28-30.

that their earlier treaties meant less than that, and it is reasonable to make the assumption suggested that this form is now used for extra caution. Yet we may well agree with Mr. Herod that "to secure *beyond question* the interpretation of an imperative and unconditional clause" this form should be used.

Nearly all writers discuss the question whether the provision of the most-favored-nation clause ought to include merely relations existing at the time of the conclusion of the treaty or ought to secure to the most-favored-nation a treatment equal to that of the nation at each and any moment the most favored, that is, whether the clause extends to favors granted in the future. Von Melle adopts the latter interpretation as essential.[8] Sig. Cavaretta cites De Cussy, Fiore, Heilborn, Ullmann, and De Martens as agreeing with Von Melle.[9] M. Visser defends that position vigorously. On the other hand, Hautefeuille holds that the clause applies only to favors existing at the moment of the making of the treaty.[10] Pradier-Fodéré takes this position.[11] Cavaretta cites Schiapparella as holding this opinion.[12] There have been inserted in many treaties express stipulations concerning "favors which shall be granted hereafter" or special provisions against future discrimination. These, it is argued, would be redundant if Von Melle's interpretation were accepted. M. Visser answers that the fact of the appearance of the express stipulation in certain treaties does not justify the argument that it forms thereby an exception to the general rule. One might as well argue, he says, that the persistent repetition of this provision in treaties containing a detailed elaboration of the clause

[8] "Die an sich mögliche Bestimmung, dass der andere Contrahent nur diejenigen Rechte haben solle, welche zur Zeit des Vertragsabschlusses der Meistbegünstigten Nation zustehen, scheint tatsächlich nicht vorzukommen und würde auch nicht unter den Begriff der Meistbegünstigungsklausel fallen. Für Letztere nämlich ist wesentlich, dass der durch sie Begünstigte zu jedem Zeitpunkt der Vertragsdauer mit der dann am meisten begünstigten Nation gleichgestellt ist. In manchen Verträgen ist ausdrücklich gesagt, dass das stipulirte Recht der Meistbegünstigung sich auf die Zukunft beziehen solle. Notwendig aber ist solcher Hinweis nicht, denn auch die ohne Zusatz vereinbarte Gleichstellung mit der meistbegünstigten Nation kann nur als eine Gleichstellung während der ganzen Vertragsdauer mit der jeweilig am günstigsten gestellten Nation verstanden werden." (Von Melle, *op. cit.*, 204.)

[9] Cavaretta, *op. cit.*, 89-90.

[10] Hautefeuille: Histoire des Origines, V, 2, 300, 301.

[11] Pradier-Fodéré, IV, 394.

[12] Cavaretta, *op. cit.*, 90.

is the proof of its general acceptance. Furthermore, treaties of commerce are meant to have and must have their effect on the future—why maintain that this one clause refers only to the present and the past? The clause, interpreted in this way, loses its greatest value. "Most-favored-nation treatment must mean treatment upon the footing of the nation most favored at any moment." [13]

As a matter of fact, the greatest value of the clause is not in what it obtains, favors present or future, but in what it prevents—discriminations; and there should also be recognized the distinction already pointed out between favors *gratuitously* granted and rights or privileges *purchased.* To Sig. Cavaretta, applying Hall's rules for interpretation, it appears evident that by virtue of the words pure and simple, "there is granted the most-favored-nation treatment," the conceding state simply intends to extend to the other contractant all the advantages already accorded to any other power without referring to any advantages which may be accorded in the future. There is no need to maintain that the concession of future advantages is a constituent element in the clause, which, interpreted in such manner, would rob the conceding state of one of its most important attributes of sovereignty by restricting its liberty of action.[14] M. Visser recognizes no examples where practice has followed the other, or "limited-to-the-present," system.[15] But surely the chief complaint which European nations have made against the application made by the United States of the clause has been that the latter refuses to consider subsequent arrangements with third parties upon a reciprocal basis as affecting its most-favored-nation obligations toward original co-contractants. If this be not an example where practice follows the other system, where can we expect to find an example! Granting that the practice of the United States is based on the distinction between the *kinds* rather than the *times* of the concessions, this does not alter the fact and the character of that practice. This suggests again a difference between favors freely granted and

[13] Visser, *op. cit.*, 83.
[14] Cavaretta, *op. cit.*, 91-92.
[15] Visser, *op. cit.*, 83.

favors extended in return for a compensation. Yet it is conceded even in the practice of the United States that the former extend immediately or upon demand to such nations as possess most-favored-nation treaties.

When the second party to a treaty comes into the enjoyment of some advantage from the operation of a treaty by which the first party grants some advantage to a third, what becomes of the newly acquired right in case the treaty between the first and third parties is subsequently withdrawn? A distinction must be made between cases where such right has accrued to the second party merely as a matter of course, and those where there has been a special correspondence between the first and second governments, granting this new right to the latter. Lehr suggests that the right may have become an integral part of the conventional law between the two powers, which, although growing out of the original treaty, has become independent of both the treaty and the most-favored-nation clause. Even so, if the second nation has not taken the trouble to secure a direct recognition of such right, it can not expect that it will continue after the removal of the original grant.[16] Visser and Cavaretta agree with this. For the advantages thus acquired, the second party has given nothing in return, and to allow these to continue would make them more durable than rights which have been gained by express stipulation. If, however, the formalities have been complied with and the right recognized, Lehr holds that the favored treatment should continue so long as the original most-favored-nation treaty between the first and second powers remains in force. To this, M. Visser (pp. 84–86), Mr. Herod (pp. 31–32), and Sig. Cavaretta (pp. 172–174) do not assent. M. Visser argues, on the basis of *cessante causa cessat effectus*, that the new treaty with the third power having been abrogated, the foundation of the right no longer exists. Mr. Herod expands and illustrates the same principle, maintaining that the favors in question, though offshoots of the original concession, yet remain subordinate to it, and that, under any other interpretation, the second nation would be securing *gratis* a new favor,

[16] Lehr, *op. cit.*, 313 ff.

thus making it more favored than the most-favored-nation.[17] Such was the position held in determining the question which arose over the application of article IV of the treaty of July 17, 1858, between the United States and Belgium.[18] In case the first and second powers have made a specific arrangement concerning the favors in question, so formal as to amount to a treaty, the new arrangement comes entirely within the operation of the clause.

> This rule does not apply to vested rights and interests. The abrogation, suspension, or termination of a treaty or any part of it by which vested rights were secured will in no wise impair or destroy them.[19]

This matter having been settled, another question arises: whether, when two nations agree upon the interpretation of a treaty between them, a third can, pleading its most-favored-nation clause, oppose itself to that interpretation, provided it can show such interpretation to be wrong. M. Visser argues, with Schraut, that it can not, while Von Melle affirms that it may.[20] To answer this question it would be necessary first to decide what would constitute a proof by a third party

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[17] Herod, *op. cit.*, 31-32.

[18] "La pratique suit toujours le système suivant lequel, aussitôt les traités contenant les avantages spéciaux devenus caducs, des tiers ne peuvent plus jouir de ces avantages par la voie du traitement de la nation la plus favorisée. Un exemple s'offre encore une fois dans l'article 11 du traité de Francfort. Pendant toute la durée de ce traité, les parties contractantes ne se sont jamais opposées à ce que des avantages, résultant de la clause de la nation la plus favorisée, disparussent en même temps que les traités dans lesquels ils étaient stipulés." (Visser, *op. cit.*, 86.)

[19] Herod, *op. cit.*, 32.

[20] "Et les contractants seuls peuvent décider si, et jusqu'a quel point, les avantages en question existent réellement. Il serait donc trop étrange si, deux états étant d'accord sur les droits découlant pour eux d'un certain traité, un tiers, qui est étranger à ce traité, intervenait et imposait aux contractants des droits autres ou plus puissants qu'ils ne le desirent eux-mêmes." Visser, *op. cit.*, 87.) "Doch wird sich nicht, wie Schraut meint, mit Recht behaupten lassen, dass * * * 'dritte Staaten auf Grund ihres Meistbegünstigungsrechtes eine anderweitige Auslegung oder Handhabung in der Regel selbst dann nicht beanspruchen können, wenn die Berechtigung ihrer Auffassung der fraglichen Vertragsbestimmung nicht bestritten werden kann.' Vielmehr wird ein vertragsmässig eingeräumtes Recht seinem ganzen Umfange nach bis zu einer ausdrücklichen Vereinbarung über seine Aufhebung oder Aenderung als bestehende, in Folge einer Meistbegünstigungsklausel auch von dritten Staaten zu beanspruchende Vergünstigung aufgefasst werden müssen." (Von Melle, *op. cit.*, 204-205.)

that the interpretation of their own treaty by the two contractants is "wrong." What may satisfy a third party is very unlikely to be satisfactory to the first and second, and the "proof" is not likely to be conclusive. Surely, under the rules for interpreting treaties, there can be little ground for difference of opinion other than as it may hinge upon peculiarities in the circumstances under which one or both treaties were made. It would seem almost incontrovertible that the interpretation to which the makers of a treaty agree shall, as regards that treaty, govern their relations, and be final.[21]

What effect will the abrogation of a treaty by one party without the consent of the other have upon the most-favored-nation treaty of a third? It is frequently provided in a treaty that it may be abrogated by either nation, or that after a given time, it may be abrogated upon a given notice. If there is no provision in the treaty, and if a treaty is to exist for a specified time, the unilateral denunciation should have no effect before the end of the specified period. Suppose, however, a country breaks a treaty, even of this sort, and in violation of what seem to be the principles of international law. There is no remedy except that of war for the second party. What becomes of the most-favored-nation rights of a third party? Apparently they will fail, just as though the treaty had been regularly abrogated.

Suppose after two nations have made a treaty on the basis of the most-favored-nation, one, through war or otherwise, loses a part of the territory within which the other enjoyed special privileges. Can the other nation claim a continuance of this most-favored-nation treatment within that territory? The doctrine of *res transit cum suo honore* might seem to imply that the obligation should continue. To apply this, however, is to overlook the distinction between obligations *real* and obligations *personal* as they appertain to a state. The obligations of alliance, friendship, commerce, navigation, extradition, and in general the *personal* relations of a ceding state do not follow the ceded

[21] "Le traité pourtant dont on dérive, au moyen de la clause, le droit en question existe seulement en vertu de la volonté des deux contractants et en dépend. En général, un troisième état n'a rien à faire avec ce traité et ne peut exercer aucune influence sur son application." (Visser, *op. cit.*, 87.) *Cf.* Hall's International Law, 5th Ed., Part 2, Chapter 10.

property. The third power can not, through the application of the most-favored-nation clause, continue to enjoy such rights in the ceded or withdrawn territory.[22]

In taking up the conditional clause M. Visser points out that a distinction—which has ordinarily been overlooked—must be recognized between two forms in which it occurs. The condition may be either (1) where a special condition must be fulfilled in order to give birth to the right to favored-nation treatment—for instance one in which the duty on certain goods is lowered if imported directly from the country of the origin; or (2) one in which an equivalent is specified for, the favored interest and the condition being separate, one state merely giving the other certain privileges on the general understanding that the latter will give certain privileges in return. In the former case, the second nation can only claim the favor granted to a third by the first upon fulfilling the same specified condition. There can be no charge of discrimination if the conditions can not be duplicated. Cases occur where particular tariffs are accorded to merchandise imported by a certain route or in a certain way, and where special circumstances govern the importation of raw material, merchandise sent to fairs, petty neighborhood transactions in live stock and produce, and border-commerce generally. These things are usually arranged for in treaties. As a rule contiguous states alone enjoy the benefit of such stipulations, other nations being unable to fulfill the conditions. Schraut* is of the opinion that the clause of the most-favored-nation does not apply to such transactions. Von Melle† and Visser‡ hold that treaties should so specify if these things are to be excepted, that is, that the clause should apply. The fact that in many treaties special provision is made to cover these cases, would seem to support this view. Yet the fact that on account of contiguity, political relations, etc., this exceptional treatment prevails in many cases without such specification makes it impossible to lay this down as a general rule.

Supporters of the limited interpretation of the clause claim

[22] See Cavaretta, *op. cit.*, 181-182.
* *Op. cit.*, 91.
† *Op. cit.*, 236.
‡ *Op. cit.*, 162.

for the interpretation of the conditional clause, in the second form as well as the first, that all are treated on a footing of equality if all *may* obtain the same advantages by fulfilling a like condition, that is, that the demand for compensation does not constitute an infringement of the clause. This view, says M. Visser, can be held only by those who lose sight of the distinction between the two forms of the condition.[23] Von Melle likewise accepts this view.[24] This is nothing more than repeating that these writers hold to the unconditional and literal—more than literal, in fact—interpretation. The distinction between the two kinds of conditions is sound, but the recognition of it does not inevitably lead to the acceptation of M. Visser's conclusion. Von Melle held M. Visser's opinion concerning both, without—as M. Visser points out—apparently having noticed the distinction between the two. Now, having the difference pointed out, we are as far from accepting M. Visser's subsequent line of reasoning as we would be if we failed to recognize the distinction. In addition to the exceptions to that position indicated elsewhere in this paper, little can be added here other than to deny that it "makes no difference on what conditions the first state has made a treaty with a third" and that "it is a matter of no difference to other [second] states whether this transaction be called a 'favor' or 'reciprocity.'"[25] That it *does* make a difference to the first state whether its concession to a third is freely given ("favor") or granted for a return ("reciprocity") is incontestable. That it should—and in fact,

[23] "Par la clause de la nation la plus favorisée, un état stipule dans un traité le droit que ses intérêts jouiront dans le territoire du cocontractant d'un traitement égal à celui de tout autre état. * * *L'état qui s'appuie sur cette clause n'a rien à faire avec les conditions imposées à des tiers par son cocontractant, tandis que celui-ci ne peut pas en appeler contre le premier état à la convention conclue avec un tiers. A l'égard de ce premier état, cette convention est une *res inter alios* dont il ne fait pas partie et qui ne peut ni lui imposer des obligations ni modifier ses droits. Cette convention ne peut donc pas voiler le droit du premier état de participer dans le domaine de son cocontractant à tous les avantages dont les autres jouissent *jure aut facto*. Donc aussitôt que, par l'accomplissement de la condition, un troisième état a obtenu un traitement favorisé pour certains de ses intérêts, ce traitement tombe dans le domaine de la clause de la nation la plus favorisée, lorsque celle-ci s'applique bien entendu à des intérêts semblables." (Visser, *op. cit.*, 163-164.)

[24] Von Melle, *op. cit.*, 205-206.

[25] Visser, *op. cit.*, 273.

does—make a very real difference to a second state follows from the fact that "favors," "freely given", to a third are not in practice denied it and only in case they were refused could it claim that it was being discriminated against to the advantage of the "more-favored" third state; while, in case of reciprocity between the first and third states, it becomes a question answerable often only by experience, whether one or the other nation is more-favored. M. Visser refuses to distinguish between the transactions to which the terms are respectively applied. Moreover, even though there may be ground for arguing that the *unqualified* clause guarantees the co-contractant a "treatment in no respect less-favored than that of any other state," it is altogether too much to make the same claim for the *qualified and conditional form,* and the best that should be claimed for the latter is that it should act as a guarantee and a prohibition against the second nation being denied the opportunity to make an equivalent concession whereby it may obtain any advantage granted a third. We are therefore obliged to take exception to M. Visser's attitude on this point.

A question which has brought the clause into more prominence than any other of late years, and which has affected English tariff policy as perhaps no other, is that of countervailing duties. The "bounty" has been characterized as an attempt by the exporting country to render illusory the protective duties levied by importing countries. The definition is incorrect, in a sense, inasmuch as the bounty is paid just the same upon articles exported to countries which levy no duty as upon those exported to countries which have a protective tariff. It is, however, very suggestive of the purpose and effect of the bounty in some cases.

The right to levy countervailing duties has been successfully defended on economic grounds. Can it be as conclusively defended on legal grounds? Are countervailing duties compatible with the most-favored-nation clause? As the question has been raised chiefly with regard to sugar, and as the sugar controversy illustrates its chief points, we may limit the consideration to certain phases of that subject.[26]

[26] Space forbids reviewing here the history of the sugar bounties and countervailing duties. For brief résumé, see Visser, *op. cit.,* 165–176. For more complete history and fuller discussion, Kaufmann, *op. cit.,* Chaps. III, IV, V.

In 1874, Great Britain removed entirely the tariff on sugar. The manufacturers of chocolate, marmalade and other sugar products prospered immensely, but the sugar-producing British colonies suffered at once. Consequently they and the English sugar refiners petitioned for a countervailing duty against the bounty-fed sugars of the Continent. Since that time the question has occupied a very important place in politico-economic controversy. In 1880, the British law officers declared countervailing duties incompatible with the most-favored-nation clause. In spite of agitation in 1881 and in 1884, the government, though recognizing the importance of protection against European sugar, felt that it would be impossible to use these duties while the treaties were in force. In 1888, representatives of Holland, England, Germany, Austria, Belgium, Spain, Italy, and Russia signed the Sugar Convention, which provided that each country should exclude bountied sugar. Of the discussions, and the attitude of the powers at that time, M. Visser says: "We can not deduce from the act of the conference a general recognition of the principle that the clause of the most-favored-nation permits the application of countervailing duties. Besides, the convention was not ratified."[27] It seems that the British foreign office even then feared that the clause in their treaties would prevent their adherence to the convention.[28] Denmark appears to have refused for the same reason to sign the convention.

In 1889, however, the new Conservative ministry advocated legislation to forbid the importation of bountied sugar. In 1897 was formed the Anti-Bounty League. Under the Tariff Amendment Act of March 20, 1899, countervailing duties equal to the foreign bounties were laid on sugar imported into India. The House of Commons voted to give the government a free hand for further measures which might be necessary for the protection of British-Indian sugar industries.[29] This levying of countervailing duties to neutralize sugar bounties has been characterized as "the first step toward reversing the free-trade policy."

[27] Visser, *op. cit.*, 169.
[28] Kaufmann, *op. cit.*, 295.
[29] Kaufmann, *op. cit.*, 292.

In correspondence with Russia in 1899, the British foreign office declared these duties no violation of the most-favored-nation clause. Lord Salisbury held that the Russian system of repaying excise duties on sugar in case of exportation had the same effect as a "bounty of a more direct nature;" that it was the intention of the most-favored-nation clause that goods shall enjoy equality of treatment, but not preferential advantages; that when an artificial preference was produced by the direct legislative act of one party to a most-favored-nation agreement, the other government might "redress the balance of trade which had thus been artificially disturbed" by discontinuing the bounty or the legislative act producing the official stimulus.[30] The same position was taken by the Foreign Office and the British representatives at the Brussels Sugar Convention and by Lord Cranbourne, Mr. Balfour, and Lord Lansdowne in 1902. Lord Lansdowne even offered to abrogate the Russian treaty.[31]

In 1894, under the Wilson Act, the United States laid countervailing duties on bountied sugar. Germany objected, especially on the grounds that bounties are purely a domestic affair of the exporting nation, and do not therefore affect the importing country, and that the attitude of the United States would render the effects of the most-favored-nation clause illusory by subjecting the exporting party to arbitrary duties which it was the object of the clause to prevent. Secretary Gresham held that the act was in violation of the treaty obligations of the United States,[32] and President Cleveland recommended but did not secure the repeal of the portion of the statute imposing the duty.[33]

In 1897, Congress passed the Dingley Tariff Act, among whose provisions was one whereby an additional duty equal to the

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[30] Note to the Russian government, July 15, 1899, Parl. Pap. Commercial No. 1 (1903). See Moore, *op. cit.*, V, 307.

[31] Moore, *op. cit.*, V, 309.

[32] The additional duty, therefore, levied by the acts of 1894 on all sugars coming from bounty-paying countries is not responsive to any measure that may be considered as constituting a discrimination by these countries against the production or manufactures of the United States, but is itself a discrimination against the produce or manufactures of such countries. It is an attempt to offset a domestic favor or encouragement to a certain industry by the very means forbidden by the treaty. Sec. Mr. Gresham to Pres. Cleveland, Oct. 12, 1894. U. S. For. Rel., 1894, 239.

[33] Cleveland's message, Dec. 3, 1894.

net amount of the bounty was to be levied on bounty-fed articles (Sec. 5). The European protests of 1894 were repeated. Russia, Germany, and Austria-Hungary especially, claimed that these duties violated treaty rights. Secretary Olney, abandoning the attitude assumed by Secretary Gresham three years before, denied the validity of their contentions, arguing:

1. The most-favored-nation clause can not interfere with international regulations.

2. The tariff is a statute enacted later than the conclusion of the treaty, and so far as inconsistent with it is controlling.

3. Representatives, not only of Great Britain, but of Germany as well, had expressly declared at the conference of 1888 that the export sugar bounty of a country might be counteracted by the import sugar duty of another without causing any discrimination which could be deemed a violation of the terms of the most-favored-nation clause.[34]

By the Brussels Sugar Convention of March 5, 1902, the signatory powers, Great Britain, Germany, Austria-Hungary, France, Belgium, Holland, Italy, Spain, and Sweden, agreed to prohibit the importation into their territories of bounty-fed sugar. Russia, not having been a party to this convention, subsequently protested vigorously against the countervailing duties imposed by the United States and England. Both these powers, however, maintained not only the necessity for, but the legality of these duties,[35] and the Sugar Commission declared that the means employed by the Russian government to encourage the cultivation and exportation of sugar constitutes bounty-feeding. Russia signed the Sugar Convention in December, 1907.

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[34] Mr. Olney, Nov. 13, 1894, 21 Op. 80, 82; Moore, *op. cit.*, V, 306. Mr. Sherman to Mr. von Reichenau, Sept. 22, 1897. U. S. For. Rel., 1897, 178.

[35] Where a tax is imposed on all sugar produced, but is remitted on all sugar exported, and the exporter obtains from his government solely by reason of such exportation a certificate, which has an actual value and is salable in the open market, the remission of the tax is in effect a bounty which subjects the sugar, on its importation into the United States, to an additional duty equal to the entire amount of the bounty, according to the act of Congress, July 24, 1897, 30 Stat. at L. 205. Downs *v.* U. S. (1903), 187 U. S. 496. "Nach den Bemerkungen Lord Cranbourne's und Balfour's, * * * 1902, scheint auch ein neues Rechtgutachten der jetztigen Britischen *law officers* vorzuliegen, welches sich in dem gleichen Sinne geäussert hat." (Kaufmann, *op. cit.*, 297.)

The argument in justification of the duties in their relation to the most-favored-nation clause is, that if the importing country accepts all sugars on equal terms, this constitutes a discrimination against countries which pay no bounties and those which pay less than the highest, to the advantage of those countries which pay the highest, and that this is contrary to the spirit of the clause. M. Visser argues, in agreement with Mr. Gresham, that it should make no difference to the importing country what were the conditions of exportation, as only the way in which articles enter its ports concerns it; further, that, the purpose of the clause being to prevent arbitrary discrimination, a nation has no right to make arbitrary classifications; that we might as well discriminate between monarchies and republics as between bounty-paying and non-bounty-paying countries; that the bounty system is, like the protective system, merely a matter of internal policy; and that the application of countervailing duties constitutes an interference with the internal legislation of the exporting country.[36]

He recognized[37] (writing in 1902) that the duties were being used more and more, but attributed this to economic, not at all to juristic, causes.

> "La compatibilité des droits compensateurs avec la clause * * * n'étant pas soutenable, il faut s'étonner que ce système fasse encore tant de progrès. Seule la politique économique en est cause." States wish to do away with bounties, but cannot do so on account of lack of unanimity. Countervailing duties work toward this end. In effecting this object, many states have had too little regard for the juristic side and the legal questions involved.[38]

Kaufmann, on the other hand, cites a long list of opinions sustaining the legality and justice of the duties.[39] He himself takes

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[36] Visser, *op cit.*, 174–176.

[37] "* * * la pratique est douteuse. Les états ne diffèrent pas seulement entre eux en ce qui concerne la compatibilité des droits avec la clause dont nous traitons, mais aussi la manière d'agir des différents états se modifie dans un court espace de temps dans l'un ou l'autre sens. On ne peut donc certainement pas parler d'une reconnaissance générale. Nous n'hésitons pas à soutenir l'incompatibilité de ces droits avec la clause * * *." Visser, *op. cit.*, 172.

[38] Visser, *op. cit.*, 176–177.

[39] Kaufmann, *op. cit.*, 298–309.

the view that the most-favored-nation clause does not forbid countervailing duties, but forbids only a fixed countervailing duty determined upon the basis of the highest export bounty paid, which would be manifestly unfair to other bounty-payers who pay less.[40]

If political economy is—as M. Visser points out—the cause, and if a legitimate object, the doing away with commercial inequalities, is to be attained, surely the most-favored-nation clause ought not be invoked to forbid these countervailing duties—for the clause owes its existence, if not its origin, to practical economic necessities; it has been a most potent instrument in the struggle for commercial equality, and the highest value set upon it by friends and enemies alike has been its power to level artificial inequalities and maintain commercial equilibrium.

International law has not yet become so established that it may be cited as either affirming or denying the right in question; whatever appears the more practical and equitable interpretation will become the law. At present, economic interests, the equities involved, and the tendency of international opinion (witness the Brussels Sugar Convention) certainly favor the attitude assumed by the United States and Great Britain.

Mr. Herod (Chapters VI–X) considers in detail many cases, from which he draws conclusions which we may conveniently group and consider as a body of quasi-rules, for most-favored-nation treatment. Omitting the discussion, we would cite as among the more important of these, the following:

1. The general form of the most-favored-nation clause, or the more limited form specifying "no other or higher duties" requires that duties on imports and exports shall be uniform and collected without any unfair discrimination against the products of the contracting state. (pp. 57–8.)

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[40] "Entsprechende Gegenmassnahmen gegen Prämien sind keine Verletzung vertragsmässig gewährter Meistbegünstigung und sind eventuell Pflicht mit Rücksicht auf meistbegünstigte dritte Staaten." (Kaufmann, *op. cit.*, 338.) "Der materiellen Auffassung der Meistbegünstigungsklausel entsprach daher bei verschiedener Höhe der fremden Prämien nicht ein einziger gleichmässiger Ausgleichzoll, sondern verschieden hohe Ausgleichzölle je nach der verschiedenen Höhe der fremden Prämien." (*Ibid*, 280.) On the policy of the United States, compare *Ibid*, 274–280. On the policy of England, *Ibid*, 280–302. Mr. Herod considers the duties both equitable and legal. Herod, *op. cit.*, 121.

2. The equality of duties applies to the time at which they are levied as well as to their amount. (p. 60.)

3. Silence on the part of the legislature under its sovereign powers, to regulate commerce, implies that that branch of commerce on which no expression is given is to be free. (pp. 62–3.)

4. It does not concern one state that the articles of commerce of another are taxed or free of duty, provided that the enforcement of the legislation governing their taxation in no way discriminates against its own articles of commerce. (pp. 63–4.)

5. A state will not be acquitted of a charge of unfair and unequal discrimination if it extends a gratuitous favor to the products of a particular geographical district which may or may not contain organized states and refuses it to nations which are entitled to the same treatment under the most-favored-nation clause. (p. 70.)

6. A regulation which relieves the importer of goods of a country from any charge on the transaction necessary to bring the goods to the seller must be extended upon equal terms to the importers of the goods of those nations which enjoy the privileges of the most-favored-nation. (p. 77.)

7. Where a tonnage tax is national in character, and a favor is extended by one nation to the vessels of another, the same favor upon terms of reciprocity should be readily granted to the vessels of all other nations enjoying the privileges of most-favored-nation treatment. (p. 82.)

8. A nation enjoying the privileges of most-favored-nation treatment in matters of commerce can justly claim, upon terms of reciprocity, rates as low as those extended under like conditions to any other nation. This applies to railroad rates, telegraph, telephone, post, bills of lading, etc. (pp. 102–5.)

9. A tax upon a bounty product, equal to the unnatural advantages which it enjoys, is justifiable. (p. 121.)

10. The general clause of the most-favored-nation does not comprehend special engagements of reciprocity. (p. 112.)

11. In questions of considerations—the sum of the concessions on one side must be taken as the consideration for the total of the favors obtained from the other party. (p. 113.)

12. Where a state has by a special treaty of reciprocity granted favors in matters of commerce and navigation, it should in justice grant to every other power with which it has treaty relations an opportunity by negotiation to arrive at what would be a fair equivalent for the favors extended by the special treaty. (p. 113.)

13. When there is withheld from a nation or its citizens any privilege, favor, or immunity to which, by operation of the clause, it or they are entitled, a claim for damages, if actual damages have been suffered, is not barred by the statute of limitations, on the theory that "where a treaty is made between two independent powers, its stipulations cannot be deferred, modified, or impaired by the action of one party without the assent of the other. If the parties, by their joint act, have established no barrier in point of time to the preservation of any treaty made by them, then neither country can interpose such limit." (pp. 33–4.) If the discrimination has taken the form of an actual money tax or loss of property the claim for restitution will rightly carry with it interest upon the amount unjustly levied when such tax has been paid under protest.

14. Where the constitution or practice of a state gives equal weight to laws and treaties and makes that which is of latest date repeal others, the courts, following the constitutional rules, are obliged to sustain a law, even though it operates to deny rights guaranteed by a treaty concluded previous to the passing of the law. This does not, however, according to the law of nations, weaken the treaty obligations of a nation, and a state remains in honor bound to carry out the stipulations of its treaties. A breach in treaty obligations renders a state committing it liable in international law and in equity to the injured party. (pp. 34–5.)

We may add to this:

15. As between two treaties which two different nations have with a third, and which are in conflict, that of older date prevails.[41]

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[41] Hall: International Law, 342; Bluntschli: Le droit international codifié 3d ed., 414. Mr. Herod also suggests—but this can not be looked upon as an expression of practice—that it seems only fair that a nation which through the policy of free trade imposes no duties on exports, should be entitled by favored nation treatment to all the benefits of a treaty of reciprocity founded solely upon mutual conditions in exchange of articles of commerce, for she has not only conceded the equivalents, but has done so in advance of such nations as have bought the favor. (*Op. cit.*, 118.)

CHAPTER VIII

GERMANY AND THE UNITED STATES: MOST-FAVORED-NATION RELATIONS

Probably no single treaty containing the most-favored-nation clause has caused more controversy than that made between the United States and Prussia, May 1, 1828. Certainly none has attracted more attention from individuals and bodies other than ministerial. This being the case, and since this controversy and its issue illustrate, in a variety of phases common to no other single instance, the necessity for careful application of certain of the principles and methods of interpretation indicated, it will be profitable to study the history of German American most-favored-nation relations in some detail.

The treaty of 1828 contains sixteen articles, reviving article XII of the treaty of 1785 and articles XIII–XXIV of the treaty of 1799. Those about which controversy has centered are articles V and IX.

> Art. V. No higher or other duties shall be imposed [on the importation into either of products of the other], than are or shall be payable on the like article being the produce or the manufacture of any other foreign country. Nor shall any prohibition be imposed on the importation or exportation of any article the produce or manufacture of [either, to or from ports of the other], which shall not equally extend to all other nations.
>
> Art. IX. If either party shall hereafter grant to any other nation any particular favor in navigation or commerce it shall immediately become common to the other party, freely, where it is freely granted to such other nation, or on yielding the same compensation, when the grant is conditional.

These two articles are practically identical with articles V and

IX of the Austrian treaty with the United States, Aug. 27, 1829, and articles VI and XI of the Russo-American treaty of Dec. 18, 1832.

As indicated above, it has been the view of the German government, put forward repeatedly, that this treaty calls for unconditional most-favored-nation treatment, and that article V is not to be considered as modified by article IX. The American government, on the other hand, has regularly maintained that, while it was the meaning of the treaty that the commerce of the two nations be put on an absolute equality as to favors granted to other nations *pro praeterito,* article IX excludes unconditional most-favored-nation treatment *pro futuro,* and that articles V and IX must be read together. In other words American diplomats have maintained, concerning this treaty, what they have maintained concerning all, that it was not, and has not been, our policy to make unconditional most-favored-nation agreements, but that all are based on reciprocity.

In order to determine which has been right, it is necessary, as Dr. Glier points out, to consider the circumstances under which the treaty was made and the meaning of similar wording in similar treaties of that period, rather than to depend on the modern arguments presented by the two governments respectively, which invariably start from different premises. What, then, was the understanding at the time the treaty was made? The résumé given in the discussion of United States practice under the subject "The History of the Clause" leaves no possibility for doubt as to the usual practice of the United States. Three cases occur where the United States has deviated from that course, and has made what cannot but be interpreted as unconditional promises. In the Swiss treaty of 1858, article X reads:

> In order the more effectively to attain the object contemplated in article VIII [most-favored-nation treatment] each of the contracting parties hereby engages not to grant any favor in commerce to any nation * * * (etc.), * * * which shall not immediately be enjoyed by the other party.[1]

[1] This clause is no longer in force.

In the treaty with the Orange Free-State, Dec. 22, 1871, article VII reads:

> Each * * * hereby agrees not to grant any favor in commerce to any nation, which shall not immediately be enjoyed by the other party.[2]

In the treaty with Servia, Oct. 14, 1881, article V:

> Neither * * * shall establish a prohibition of importation, exportation, or transit against the other which shall not be applicable at the same time to all other nations.

And article VI:

> * * * also every favor or immunity [concerning importation, exportation, etc.], which shall be later granted to a third power shall be immediately extended, and without condition, and by this very fact, to the other contracting party.[3]

There are no such promises of immediate or unconditional extension of favors in the Prussian treaty of 1828. Clearly it cannot come in that group.

There are, further, at least five United States treaties[4] for which the suggestion might be made, since they do not contain the stipulation for compensation, that they constitute engagements for unconditional most-favored-nation treatment.

These treaties contain such articles as the following:

> No higher or other duties [shall be imposed on importation or exportation to or from either * * * from or to the other] and no prohibition [shall be imposed] which shall not extend equally to all other nations.

They do not contain elsewhere the clause requiring compensation. The United States government, however, not only recognizes no unconditional interpretation and no generalization of tariff concessions but it has held that, even where the compensatory clause is omitted, it is to be understood. We may without hesitation accept Dr. Glier's conclusions that none of this second group contemplate unconditional most-favored-nation treatment.

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[2] This treaty lost effect when the Orange Free-State was absorbed into the British Empire.

[3] See also Art. XIII. This treaty is still in force.

[4] With the Netherlands, Oct. 8, 1782,—Great Britain, Nov. 19, 1794,—France, Sept. 30, 1800,—Great Britain, July 3, 1815,—Hanover, May 20, 1840.

But, even if these could be added—which they cannot—to the three which are conceded to have contained the unconditional promise, thus making a significant number of exceptions to the general American practice, the Prussian treaty does not fall within that number, but belongs to the group in which the majority of United States treaties fall, that is, among those containing the compensation clause.

That the American intention in general in making treaties in this latter form has been to apply the conditional treatment cannot be denied. A glance at the correspondence of our secretaries of state makes this point incontrovertible. What then may have been the intention at the time of the making of this particular treaty? In 1823 Mr. Gallatin had stated explicitly that the United States idea of most-favored-nation treatment was on the basis of equivalent compensation. In the year following, 1824, the United States made the treaty with Colombia which introduced the reciprocity principle to South American states. In the matter of tariff policy, the movement toward protection which began in 1816 and set in strongly after 1819, had "reached its highest point in 1828."[5] In 1828 came the treaty in question, with Prussia. In 1829, Aug. 29, we made a similar treaty with Austria. An opportunity was presented almost at once for our government to declare its position concerning the meaning of this treaty. The opinion which was delivered leaves little to be desired in the explicitness with which it lays down the American view. To the Austrian request for reductions on wines similar to those given France under the treaty of 1831, Mr. Livingston replied, in 1832, that it could not be imagined that either party intended to forego the advantages which might be derived subsequently from contracts with other nations for "equivalent reductions." Further, he declared that article V and article IX must be read together, that there was no contradiction between these articles, that article IX confirmed article V, and that the two together meant that if duties were lessened in favor of a third nation the second should obtain like reductions for an equivalent.[6] Again, in 1831, came our contention with France

[5] Taussig: Tariff History of the United States.

[6] See Livingston's Note to Lederer, Nov. 5, 1832. Moore, *op. cit.*, V, 261.

over the treaty of 1803, in which our secretary of state strenuously denied, quoting also from his predecessors, that the United States had made an unconditional, most-favored-nation treaty with France. Is it likely that if the United States had had unconditional most-favored-nation treatment in mind in making the treaty in 1828, it would in 1831 have denied ever having entertained notions of that practice? Would the United States in making a treaty with Russia in 1832 have employed again the same words used in the treaty with Prussia in 1828 and in that with Austria in 1829, had it not considered that its declaration in 1831 established its position as to the meaning of its most-favored-nation stipulations?

The evidence leaves no doubt as to what was the attitude and understanding of the United States when the treaty of 1828 was made. The Americans had in mind conditional most-favored-nation treatment. What, then, was the idea of the Prussians?

Dr. Glier, having shown, as we have indicated elsewwhere, that the principle of reciprocity was widely in vogue during this period, and that the conditional form of the clause, in what are plainly reciprocity treaties, was of very frequent appearance, exhibits eighteen treaties of German states with American countries for the period between 1825 and 1860 concerning which he asserts that not one stipulates for unconditional most-favored-nation treatment.[7]

The United States had, previous to 1828, made two treaties with Prussia, one in 1785 and the other in 1799. It had been the policy of Prussia during and after the American revolution—a policy begun by Frederick the Great—to allow merchants of the United States coming to Prussian ports to "enjoy complete freedom and be treated with all the consideration given merchants of other lands." The years 1828 and 1834 witnessed a wide extension among German states of the policy of removing internal trade barriers, while at the same time new customs duties were established on the frontier of the Zollverein, duties which were to constitute a "protective barrier against foreign competition." Prussia was then, in 1828, a follower of protective tariff policy.[8]

[7] Glier, *op. cit.*, 81.
[8] *Cf.* Worobkiewicz: Zur Handelsvertragspolitik, 23.

Now, the treaty with the United States of 1828 was meant to put the commerce of the two nations "on a basis of absolute freedom," but this surely did not imply free trade. No more did it imply unconditional most-favored-nation treatment. Both countries were followers of the principle of reciprocity. Both were using a protective tariff. From 1828 to 1860 Prussia was numbered among the "vigorous opponents of unconditional most-favored-nation treatment." The reciprocity principle appears clearly in article IX of the treaty of 1828. Both before and for a long time after, Prussia as well as other German states had distinguished between a restricted and an unrestricted favored-nation clause. The inevitable conclusion is that the Prussian as well as the American negotiators had the conditional rather than the unconditional practice in mind.

Such being the case, articles V and IX should be interpreted together, just as Mr. Livingston's note to Austria in 1832 indicated that they must be for the Austrian treaty. The treaty of 1828, then, calls for *conditional,* not unconditional, most-favored-nation treatment. Dr. Glier reasons to this conclusion regarding this treaty, and he holds the same view for the treaty of Sept. 19, 1857, between Argentina and Prussia. In this latter treaty the compensation clause precedes the general article which promises that "no higher or other duties will be levied * * * than on products of any third country" (articles III and IV, respectively). Here, likewise, the two clauses must be read together.[9] He goes even further, and from a careful comparison of the wording and circumstances of several treaties of the United States, Prussia and Argentina [10] he reaches the conclusion that their most-favored-nation clauses are not unconditional even *pro praeterito.*[11] He points out that article V of the United States-Prussia treaty of 1828 in reality states merely the negative side of most-favored-nation treatment; it prevents discriminations and assures each state that it will not be put at a disadvantage with others as regards the general tariff; while article IX states the positive side and guarantees the extension of favors

[9] Glier, *op. cit.,* 277-299.

[10] U. S.-Prussia, 1828; U. S.-Argentina, 1853; Prussia-Argentina, 1857; U. S.-Nicaragua, 1867.

[11] Glier, 44-49.

(in return for compensation) which may be subsequently granted to third states.[12]

Although the inference might be drawn from this summary of Dr. Glier's elaborate presentation that the meaning of the treaty of 1828 could have been arrived at by a comparatively simple study, as a matter of fact from the time when the clause first began to have an importance through the changes which the last two decades have wrought in European tariff policies, these two clauses in that old treaty have been the source of endless disagreement. The Germans have agitated themselves over the denial by the United States of their claim for unconditional treatment. Our department of state, while it has been consistent in maintaining that the Germans have, under the treaty, no unconditional most-favored-nation rights, has, at the same time, been somewhat inclined to take advantage of the circumstances in which Germany has placed herself through her treaties with neighboring European states by demanding "freely" for United States commerce concessions which it is not surprising that the Germans should resist most strenuously. The Germans, on the other hand, have not been unanimous in their conception of the content and obligations of the clause, and have exhibited some inconsistency and lack of co-ordination in the arguments by which they have supported certain contentions.

We have already spoken of the claims presented by Germany after the making of the United States-Hawaiian treaty of 1875, and of how the Germans in making their treaty with Hawaii, in 1879, recognized the peculiar relations of Hawaii and the United States as a sufficient ground for making "exceptions" to the rule which they considered laid down in the treaty of 1828. In 1883 the Bundesrat failed to include the United States in a list of eighteen states which were entitled by treaty to tariff reductions. But in 1885, in a list of twenty-four most-favored-nation states which were entitled to the reductions made to Spain, the name of the United States was included. No change had occurred in the treaty relations of the two governments in the interval.

The action of Germany in concluding the Saratoga convention

[12] Glier, *op. cit.*, 255–262.

in 1891, clearly indicates that either the German government did not consider itself bound to accord to the United States unconditional most-favored-nation treatment, or it knowingly overlooked what rights the acceptance of that interpretation implied in favor of both parties. According to that interpretation each country should have given the other all the concessions which it made to any third. But by the exchange of notes of August 22, 1891, Germany expressly promised to remove certain restrictions upon the importation of American meats, and to give American agricultural products the same treatment accorded to agricultural products of Austria and other countries, while in return, and as a compensation, the United States removed the duty on sugar from Germany. Neither gave the other *freely*, and neither gave the other *all*, the favors given to third parties. Neither was enjoying from the other unconditional most-favored-nation treatment.[13] Staats-Sekretär v. Marschall said in 1897:[14]

> The Confederated Governments, when they had negotiated the commercial treaty with Austria-Hungary in 1891, did not doubt for a moment that they had the obligation to concede to the United States the same reduction of tariff which they had granted to Austria-Hungary.

The Wilson Tariff act, in 1894, not only made sugar dutiable, but provided that all sugar from bounty-paying countries pay an additional duty of one-tenth of a cent per pound. The Germans protested against this, as a violation of the most-favored-nation clause, especially since Germany was paying a bounty "by no means as high as those of Austria or France."[15] In 1897 the new tariff contained a provision which remedied this latter difficulty by making the countervailing duty equal the net amount of the bounty. The German government still protested on the ground that the duty as applied on German sugar violated the treaty of 1828 and "destroyed the premises on which the Saratoga Notes were effected."[16] But the Saratoga Convention had fallen when the tariff of 1894 went into effect.

[13] For an interesting point as to the ideas which the respective governments entertained at that time of their obligations see Fisk: German-American Most-Favored-Nation-Relations, Jour. Pol. Econ., 1903, 11:226.

[14] In the Reichstag, May 7.

[15] U. S. For. Rel., 1894, 234-9.

[16] U. S. For. Rel., 1897, 175-7.

In 1894 there came up the contention over our salt duties.[17] Mr. Olney, as attorney-general, said, " * * * The United States concedes 'free salt' to any nation which concedes 'free salt' to the United States. Germany, of course, is entitled to that concession upon returning an equivalent.[18]

By the act of 1894 salt had been put on the free list, but salt coming from any country which imposed a duty on salt from the United States was subject to a duty. Two years later, in 1896, Mr. Olney, then secretary of state, referring back to his opinion in 1894, raised the question of the applicability of the treaty, suggesting that he would be greatly assisted by being "informed of the grounds, if any, for regarding the treaty stipulation [of the treaty of 1828] as now operative with respect to the whole German Empire.[19] No response to this request appears to have been given.

This raises a general question of interpretation which becomes practically applicable at this point: What becomes of the treaty rights and obligations of a state which merges its identity in that of another or others? Did the treaty of 1828 continue in force? If so, did it apply to the whole German Empire, or to Prussia alone? Without going into the abstract question—there is sufficient ground for supposing that the treaty would continue in force so far as Prussia was concerned, though even that, may, with good precedent, be denied.[20] The position of Prussia

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[17] Mentioned *supra*, Chapter IV.

[18] Moore, *op. cit.*, V, 273–4.

[19] Note to Baron v. Thielmann, Feb. 25, 1896, U. S. For. Rel., 1896, 208–209. Moore, *op. cit.*, V, 353.

[20] Cessation of independent existence (when Hanover and Nassau were incorporated by conquest into the Kingdom of Prussia) rendered the execution of treaties impossible.

Terlinden v. Ames (1902), 184 U. S. 270, 283. Moore, *op. cit.*, V, 320.

"Neither party to a contract can make its binding effect dependent at his will upon conditions other than those contemplated at the moment when the contract was entered into." Hall: International Law, 5th Ed., 351–2.

That treaties of a state cease upon its incorporation into another state is laid down by Halleck: "But the obligations of treaties even where some of their stipulations are in terms perpetual, expire in case either of the contracting parties loses its existence as an independent state, or in case its internal constitution is so changed as to render the treaty inapplicable to the new condition of things," Halleck: International Law, Ch. 18, Sec. 35. See Wheaton, Elements of International Law, Sec. 275.

Vattel held that even a partial loss of sovereignty, as in the case of an

in the German Confederation is unique. Also, Prussia was in no sense "absorbed" in the forming of the German Empire. Furthermore its predominance in the empire may readily be used as an argument for the extension of the application of its treaties to the whole empire. But there is no substantial ground, other than this, for urging that the application extended thus.

Supposing that we admit that the treaties of Prussia remained in force. This does not at all imply the admission of their extension to the empire. What evidence have we for deciding this point? It appears that the treaty was at first regarded by both the American and the German government as applicable not only to Prussia but to the entire German Empire.[21] When German-American relations assumed a larger importance the German government continued to emphasize this claim while the United States emphatically denied it. Many of the agreements and obligations of Prussia were extended first to the North German Bund and later, with those of the Bund, were passed on to the empire. On the other hand there are many cases in which the treaty obligations of the separate German states continued in force but only as obligations of the original contracting state.[22] Although the

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alliance, causes ancient treaties to fall, if incompatible with such alliance. Moore, V, 349.

"The forcible incorporation of Hanover into the Prussian kingdom instantly destroyed previous Hanoverian treaties. The admission of Texas into our Union * * * extinguished the treaties of the Independent Republic of Texas. The recent French law declaring Madagascar to be a colony of France ended the former treaties of that kingdom. It is the fact, not the manner of absorption that determines treaties. It does not even follow that existing treaties of the absorbing state extend to the acquired territory. The treaties of the German Empire are held not to apply to the ceded French provinces of Alsace and Lorraine. * * * the fact of Hawaii's ceasing to exist as an independent contractant extinguishes" [its treaties]. (Mr. Sherman to Mr. Toru Hoshi, June 25, 1897. Moore, V, 349-50).

"Die Konstitution Preussens ist aber doch durch die deutsche Reichsverfassung derart eingeschränkt, dass Preussen keine eigene Handelspolitik, die für die Erfüllung des Vertrages vom Jahre 1828 Voraussetzung ist, mehr machen kann." (Glier, 305 foot-note.)

[21] Fisk: Jour. Pol. Econ., 1903, 11: 221.

[22] By the formation of the North German Union the entire navy of the union was placed under the command of Prussia. It was advised that the provision of the treaty between the United States and Prussia, May 1, 1828, for the arrest of deserters from the public ships of the respective countries applied to public vessels sailing under the flag of the North German Union. Evarts, At. Gl., (1868), 12 Op. 463; Moore, *op. cit.*, V, 353.

The continuance of the extradition treaty between the United States and

treaty of 1828 was not formally recognized as extending to the empire, it was declared in the Reichstag Feb. 10, 1885, that the United States was entitled to most-favored-nation treatment in Germany. This was repeated in the Bundesrat, Jan. 30, 1892, and again in the Reichstag, May 31, 1897. Count Posadowsky called attention on Jan. 14, 1903, to the position of the government in 1885, quoting this as a recognition of the application of the treaty. These were unilateral declarations as to the force of the treaty. Neither government could of itself declare such extension of treaty obligations.

On the side of the United States, Secretary Gresham said, in 1894, "the stipulations [of the treaty of 1828] placed the commercial intercourse of the United States and Prussia, not the entire German Empire, on the most-favored-nation basis." Secretary Olney expressed similar views, and Secretary Sherman the same in January, 1898.

Herr Calwer, a member of the Reichstag, writing in 1902, took the position that Prussia could not carry on an independent tariff policy, and that this treaty had applied only to Prussia, wherefore it lapsed of its own accord, making the immediate question whether Germany wished to renew the Prussian treaty and whether the United States would agree to its extension to the empire.[23] Dr. Glier is of the opinion that the treaty never applied to the empire and that the new relation which Prussia assumed and the alteration which was made in the Prussian constitution at the time of the making of the treaty abrogated the treaty altogether.[24] Although it has been repeatedly discussed within the last ten years no official decision of this question has been arrived at.

In 1896, Staats-Sekretär v. Marschall declared that the treaty of 1828 called for *unconditional* most-favored-nation treatment.

Bavaria was recognized by the United States District Court, but not as extending to the Empire. In re Thomas, 12 Blatch, 370 (1874).

In 1889 the German foreign office issued a memorandum on the subject of extradition saying that as this subject had not been regulated yet by the whole Union, the several states were free independently to regulate extradition by agreements with foreign states, and that "with the United States also extradition is regulated by various treaties." Moore, *op. cit.*, V, 355.

[23] Calwer: Meistbegünstigung der Vereinigten-Staaten, 28. See Fisk: Jour. Pol. Econ. 1903, 11: 235–6.

[24] See Glier, 303–307.

In 1898, the United States made an arrangement with France by which it granted the French the concessions allowed under Sec. 3 of the Dingley Act. Germany claimed the concessions granted to France. In the Reichstag, on Feb. 11, 1899, Staats-Secretär v. Bülow declared that the treaty guaranteed *unconditional* most-favored-nation treatment; that article V was not limited by article IX; that as article IX mentioned only commerce and shipping ("Handel und Schifffahrt"), customs duties were not included in it, but in article V alone; and that, therefore, the requirement for compensation did not apply to tariff concessions. This was clearly a forced distinction. Article V applies to the general tariff and asserts only the negative side of most-favored-nation treatment. The two clauses must be read together. Count Kanitz, referring to our denial of the advantages given France, proposed in the debate [25] that instead of giving notice of an intention to terminate the treaty of 1828, the Germans give it the American interpretation in applying it to the United States.[26] On the same day Count Posadowsky asserted that Germany was entitled to unconditional most-favored-nation treatment and that the practical question was whether Germany should continue in her understanding of the obligations of the clause or should adopt the interpretation of the United States and decline in future to give the United States the advantages of the Caprivi treaties. Upon being apprised of this, Secretary Hay wrote to our ambassador to Germany, Mr. White: "While we do not deny the right of Germany to adopt the same construction which controls the action of this government, it should be remembered that whatever construction may be adopted it must be applied uniformly to all governments that are protected by the like treaty clauses. * * * It is evident that Germany cannot apply one construction in her relations with this government and another in her relations with an European government.[27] Our government regretted that the Germans "should refuse to consider article IX * * * as having any force or effect in connection with article V." The concessions to France had been dependent upon compensation.

[25] In the Reichstag, Feb. 11, 1899.

[26] U. S. For. Rel., 1899, 297. Moore, *op. cit.*, V, 285.

[27] Hay to White, April 8, 1899. U. S. For. Rel., 1899, 301. Moore, *op. cit.*, V, 387-8.

"The American government is ready to make the same concessions to Germany for equivalent concessions." If the concessions should be "freely" granted to Germany, the United States would have to grant the same gratuituously to all other nations.[28]

The matter was temporarily settled by the German-American reciprocity agreement, of July 10, 1900. By this the American government obtained all the tariff advantages which European countries were enjoying under the Caprivi treaties. The United States did not accord Germany absolute most-favored-nation treatment but made certain concessions authorized in the Dingley Tariff Act. Certainly in this transaction neither government was negotiating upon the basis of an unconditional most-favored-nation obligation. This agreement was to regulate German-American commercial relations until 1903, after which Count Posadowsky claimed they would rest again on the treaty of 1828.

In the interval the Germans were making a scientific study of various tariff questions, and the government began to revise its views on the subject of its most-favored-nation obligations. Herr Calwer pointed out that the treaty of 1828 was inoperative. Dr. Paasche said, Dec. 13, 1902, in the Reichstag, "We expect that the government will undertake a thoroughgoing revision of all treaties giving the most-favored-nation advantages. * * * We have absolutely no occasion to concede anything to such nations as are glad to take what we give other countries without making us any concessions in return. The United States has introduced the limitation of the most-favored-nation clause; we have every reason to act in precisely the same manner." [29] On the 15th of January, 1903, Count Posadowsky declared "the United States no longer enjoys most-favored-nation treatment in Germany." [30] By this he meant that the United States was no longer recognized as having a right to demand unconditional most-favored-nation treatment. This amounted to a recognition of the reciprocal nature of the treaty of 1828. Count Posadowsky said that he him-

[28] The notes of the U. S. Department of State make certain errors in this correspondence, *e. g.*, in speaking of "Article XXVI" of the treaty of 1828. U. S. For. Rel., 1899, 301. That treaty had but twenty-four articles. The reference is evidently to Art. IX.

[29] Quoted by Prof. Fisk: Jour. Pol. Econ., 1903, 11: 236.

[30] Die Vereinigten-Staaten sind nicht mehr meistbegünstigt in Deutschland."

self had previously been mistaken in believing that concessions made to other countries in new European treaties would have to be given to the United States ("ohne weiteres").[31] He also stated the necessity for revising our treaty relations and for arriving at a common basis for dealings and interpretations. In February, 1905, appeared Dr. Glier's book. In his effort to discover the real meaning of the German treaties, and to formulate a policy for German most- favored-nation practice in future, he arrived, after having studied more than 500 treaties, at such conclusions as the following: That the interpretation given the treaty of 1828 by the German government was entirely wrong;[32] that Germany had no right to demand unconditional most-favored-nation treatment of the United States;[33] and that the Americans have loyally fulfilled their treaty obligations.[34] He concludes also that Germany had likewise only a *conditional* most-favored-nation treaty with Argentina and had therefore neither the right to demand, nor the obligation to give, concessions from and to Argentina except on a basis of reciprocity.[35]

Among modern treaties which contain the clause, none is more striking in character than the Frankfort treaty which was made at the close of the Franco-Prussian war, between France and Germany, May 10, 1871. In this we find the pledge, in article XI, that the French and German governments will base their commercial relations upon the system of reciprocal treatment on the footing of the most-favored-nation. * * * This rule shall not apply * * * to favors which either has granted or

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[31] Das würde der Fall sein, wenn wir mit den Vereinigten-Staaten ein allgemeines Meistbegünstigungsverhältnis hätten. Das ist aber nicht der Fall. * * * Davon kann also gar keine Rede sein, dass den Verein gten-Staaten von Amerika ipso facto eines Vertragsabschlusses mit anderen Staaten neue Konzessionen zufallen könnten." Quoted in Glier, 267. See also Glier, 310.

[32] " * * * die Ueberraschung der Reichsregierungs völlig unbegründet war." Glier, *op. cit.*, 81.

[33] Wir hatten keinen glatten Meistbegünstigungsanspruch gegen sie," 273.

[34] " * * * die Amerikaner ihren Vertragspflichten loyal und gewissenhaft nach zu kommen bestrebt sind," 274-5.

[35] Passim—but especially pp. 6, 8, 9, 61-2, 277. The Argentinian-Prussian treaty of 1857 has never been abrogated, and the same arguments apply as to its being or not being in force which have been cited for the United States-Prussian treaty.

shall grant to states other than England, Belgium, Holland, Switzerland, Austria and Russia.[36]

At a meeting of the German Landwirtschaftsrat on the 9th of February, 1904, Count Hans Schwerin said that the Frankfort treaty made it necessary that Germany give the United States all the concessions which Germany made to France gratuitously. The Frankfort treaty had placed German-French commerce upon a basis of permanent unconditional most-favored-nation treatment. Herr Calwer had written in 1902, "we must grant to France gratuitously every concession made to England, Belgium, Holland, Switzerland, Austria, and Russia. * * * There follows indirectly from this affirmation of the principle of reciprocity [on the basis of article IX of the Prussian-American treaty] the legal claim of the United States to unrestricted most-favored-nation rights. Since all advantages accrue to France without reciprocal compensation, such compensation can no longer be demanded of the United States." In other words, says Professor Fisk, Germany had placed herself in the position of being morally obligated to give United States *unrestricted* most-favored-nation privileges while she can only claim *restricted* privileges in return.[37] Dr. Glier strenuously objects to this view of the obligations of Germany under article IX in the treaty of 1828, in connection with her obligations to France under the treaty of 1871. His contention is that the favors granted by Germany to France are not gratuitous, but in return for compensation. This, because France treats most German imports on a better footing

[36] Sont compris dans cette règle les droits d'entrée et de sortie, le transit, les formalités douanières, l'admission et le traitement des sujets des deux nations ainsi que de leurs agents.

Toutefois, seront exceptées de la règle susdite les faveurs qu'une des parties contractantes par des Traités de Commerce a accordées ou accordera à des états autres que ceux qui suivent; L'Angleterre, la Belgique, les Pays-Bas, la Suisse, l'Autriche, la Russie.

The appearance of the clause in this sort of a treaty and in this form is unique. This was not a commercial treaty, with a limited duration, but a political treaty which cannot be denounced at the will of either party, and which is in theory, perpetual. It is claimed that in operation each party has been given the benefit of every favor which the other has granted to the nations specified. This worked at first somewhat unfavorably to France, as Germany assumed a passive attitude and allowed the French to make treaties from which Germany reaped the benefits. With time the conditions have been substantially reversed.

[37] Fisk, Jour. Pol. Econ., 1903, 11:222.

than the same goods imported from the United States. If it can be shown that France makes Germany concession for concession, the soundness of Dr. Glier's position cannot be questioned. But the evidence presented is not conclusive. The all-comprehensive form of article XI of the Frankfort treaty, implying that the advantages now extended and to be extended by each of the contracting parties shall be considered as equivalents for all advantages extended and to be extended to it by the other, is the most explicit provision for the "free" granting of future favors which can be imagined, and this "blanket" compensation scarcely meets the principle of special compensation. But even were Dr. Glier's point established as regards Franco-German relations, so long as Germany "freely," grants to other nations having most-favored-nation rights, the concessions which she grants France, there can be no question of denying the same advantages without compensation to the United States. The only real escape from that obligation—and the sound one—is to assert that the treaty of 1828 is no longer applicable.

On December 17, 1903, the United States-Cuban reciprocity treaty was proclaimed. By this treaty all Cuban articles which are not admitted free into the United States are given 20% reduction on the general duty, and articles of the United States enjoy from 20% to 40% reduction from the general tariff on entering Cuba. Article VII lays down that neither country will grant to a third the advantages granted to the other. The rates granted by each to the other shall continue during the term of the treaty "preferential in respect to all like imports from other countries." The United States will admit "no sugar the product of any foreign country, * * * at a lower rate than that provided by the tariff act [of 1897]." This establishes a very real differential, and would at first seem directly contrary to the practice of the United States which is that every country shall be given the opportunity to obtain advantages conceded to a third by offering compensation. This provision discriminates especially against German sugar. The Germans have pointed out that even though the relations of Cuba and the United States are unusually close, yet Cuba is a sovereign state and the United States bargains with her as such. According to the German view, so long as Germany and the

United States have most-favored-nation relations, the United States must give Germany the opportunity to offer a concession for which she may secure the advantage granted to Cuba. Whether or not one will grant this depends on the view taken of the relations between Cuba and the United States. There is much similarity between this case and the Hawaiian case wherein in 1878 Germany admitted that "extraordinary circumstances" made the preferential between Hawaii and the United States warrantable. South American treaties now expressly exclude favors granted South and Central American states from the operation of the most-favored-nation clause. Portuguese treaties expressly exclude favors granted Spain and Brazil. Sweden, Norway, and Denmark exclude favors granted each other. Colony holding countries expressly or impliedly exclude the reciprocal relations of the mother country and the colonies. Japan excludes favors granted to Korea and lands east of the Straits of Malacca. Why should not the relations of the United States and Cuba be excepted from the operation of the most-favored-nation clause? The denial of this right can be made only by placing emphasis upon the necessity for *express* exception.

In the new series of German tariff-treaties, whenever rates differing from those already in effect were established with a given country, those rates were extended automatically to all other countries with which Germany had most-favored-nation relations. The German Embassy notified the United States government that the arrangement of 1900 would be terminated in time to apply to the United States the new general rates which were to go into effect March 1, 1906. Toward the end of 1905 they presented certain demands by meeting which the United States could secure the transitory extension to our commerce of the lower rates. These demands included especially a number of changes in our methods of customs administration. This was met by the issuing of a series of orders to our consular agents and customs officers and a proclamation by the president renewing reductions of duties, specified in the Dingley Act. The German government considered these concessions sufficient to warrant the extension to the United States of the rates established in the seven new treaties. This arrangment was to continue in force

until June 30, 1907. In the summer of 1906, Germany made further treaties with Sweden and Bulgaria, and refused to extend the additional conventional rates to United States, although they extended automatically to the parties to the seven treaties. Plainly, Germany did not consider that any unconditional most-favored-nation obligation existed between herself and the United States, and plainly the United States are liable to be discriminated against at any time.

At this point the United States Tariff Commission of 1906 was appointed.[88] After several months' work in Germany with the experts whom the German government had appointed the commission made a partial report, February, 1907, proposing: (1) the continuance of the *modus vivendi* for one year; (2) the adoption of a reciprocity treaty with Germany, including the concession of certain rates of duty on each side. A commercial agreement was signed May 2, 1907, which went into effect July 1, 1907. Under this agreement about 97% of the imports of the United States are subjected in Germany to the conventional tariff, that is, receive the reduced rates made to countries having most-favored-nation relations with Germany. In return the United States government made changes in the customs and consular regulations along the lines requested by Germany. This convention was to continue in force until July 30, 1908, and afterwards, subject to six months' notice for termination. This agreement then is the basis upon which commerce of the United States with Germany is now regulated.[89]

The treaty of 1828 has not been formally abrogated by either government, nor have the questions whether it extends to the whole empire or only to Prussia, or whether it calls for unconditional or conditional most-favored-nation treatment, been decided. But so far as its most-favored-nation clauses are concerned, it is absolutely a dead letter. Neither in theory nor in practice have its terms applied to German-American relations in

[88] N. I. Stone, of the Bureau of Manufactures; S. N. D. North, of the Census Bureau, and E. P. Garry, of the Treasury Department.

[89] On the subject of our recent commercial relations with Germany see, 60th Cong. 1st Sess., Sen. Doc., 185; Weltwirtschaft, 1907, I, p. 16, and 1908, I, p. 8; U. S. Tar. Series, No. 7, 1908; Willis, H. P.: Reciprocity with Germany, Jour. Pol. Econ., 1907, 15:321-344, 385-398.

recent years—we may almost say, since 1891. As a matter of fact this treaty has been omitted from the list published by the British government in 1908 of "Commercial Treaties in Force." The present arrangement is satisfactory neither to Germany nor to the United States. It is imperative that we come to an agreement concerning a new and sound commercial policy, and one of the first problems to be solved in the effort to reach an agreement is a common basis for most-favored-nation treatment.[40]

[40] See Willis: Jour. Pol. Econ., 1907, 15: 388 ff.

CHAPTER IX

ADVANTAGES AND DISADVANTAGES. SUGGESTIONS

The objections to the most-favored-nation clause fall into three classes: (1) those which find fault with its operation in general; (2) those which condemn the strict interpretation; and (3) those which are urged against the limited interpretation.

Among the general objections, the most prevalent is that the clause becomes a hindrance to the freedom of action of a nation. This is the sentiment which has led some nations to attempt to abolish their most-favored-nation treaties — and it is readily seen that this idea is entertained in conjunction with a policy of strict interpretation. At the same time the *uncertainty* and *vagueness* which attach to the clause have given rise to widely divergent views as to its value and no little misapprehension of its advantages and disadvantages. The fact that the third nation sometimes gets at almost no cost a greater privilege than a second has purchased at what to it is a great price, and that a nation can not be sure when it makes such a treaty how future circumstances may affect its value or how a co-contractant may eventually interpret it, suggests an insecurity which results in some cases in a decided aversion to the use of the clause.[1]

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[1] The circumstances that every later favor will also have to be extended to all the earlier parties to treaties "raubt im übrigen dem Zugeständnisse einen Teil seines Wertes als Austauschobject; und so ist es gekommen, dass die Meistbegünstigungsklausel sich oft mehr als ein Beförderungsmittel der Zollermässigung gezeigt hat. Dadurch ist sie vielerorts in Miskredit geraten." Oncken, in Handwörterbuch, IV, 1079.

Si le traité de commerce permet de tenir compte dans les relations internationales, des intérêts spéciaux que l'on peut avoir vis-à-vis de chaque pays en particulier, la clause de la nation la plus favorisée a pour effet d'annuler cet avantage." Poinsard: Droit International, 374.

Dr. Manuel Herrero Espinosa, ex-Minister of Foreign Relations in Uruguay says that the absolute most-favored-nation clause is completely inadmissible —because it is very difficult, if not impossible, for two countries to make

M. de Martens considers it wrong to expect the strict interpretation of the clause to apply at all times. We should distinguish between a commercial advantage pure and simple, and an exchange of advantages. In the latter case, for the second nation to demand the favor granted the third nation, would work a hardship to the first, and this would be contrary to the principle of reciprocity contained in the treaty.[2] Lehr, however, doubts whether this distinction will be recognized by a nation which has made an unqualified most-favored-nation treaty.[3] Von Melle, while he seems to insist upon the principle of strict interpretation, recognizes that even under the best conditions, its general application may result in injustice.[4] He gives the example suggested by Schraut,[5] and since quoted by almost every writer on the subject: A certain state may have concluded a treaty with another not to levy a duty upon the wines of the latter according to the percentage of alcohol, so long as that state does not levy similar duties upon the wines of the former. Yet a third state, though charging duties on wines according to the percentage of alcohol, might demand in virtue of the most-favored-nation clause this more advantageous treatment for its wines. This would evidently be unjust to the first nation. It does not, however, he adds, imply the falsity of the general principle,[6] and he would apparently put nations on their honor not to take advantage of one another.[7]

A strong objection to the clause is based upon the fact that in

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engagements on a basis of absolute equality with a third. He says, further, "Me pronuncio, pro tanto, decididamente en contra de los tratados que se concretan á la enunciación de la cláusola de la nación más favorecida sin excepciones, pues es dar por nuestra parte—hablo de América—una enormidad sin recibir nada en beneficio." Quoted in Argentina: Doc. Dip. y Consulares, Bol. No. 17, 1903, p. 17.

Cf. Cavaretta, *op. cit.*, 159.

[2] De Martens, Droit international, II, 322; also, Calvo, Droit international. VI, 287.

[3] Lehr, *op. cit.*, 315.

[4] "Andrerseits lässt sich freilich nicht verkennen, dass durch die stricte Interpretation der unbeschränkten Meistbegünstigungsklausel in einzelnen Fällen sehr harte Consequenzen für den Verpflichteten entstehen können." (Von Melle, *op. cit.*, 206.)

[5] Schraut, *op. cit.*, 43.

[6] Von Melle, *op. cit.*, 206.

[7] "Uebrigens dürfte von der Loyalität der contrahirenden Staaten die Abstandnahme von einer derartigen unbilligen Ausnutzung der Meistbegünstigungsklausel zu erhoffen sein." (Von Melle *op. cit.*, 206.)

general the obtaining of any favor — this is the view of those who look to the clause for positive advantages — depends upon a treaty subsequently made by the co-contractant with a third state, which leaves the treaty in this respect incomplete and the advantages to be derived from it a very uncertain quantity. For instance, Staats-Sekretär v. Marschall suggested that the clause acquires no value in any given treaty until further treaties are made with other states. It thus acquires its real import not from the will of the parties to the original treaty but through the "treaty-will" of other states.[8] This, Dr. Glier regards as strongest among the arguments against unconditional favored-nation practice.[9] A further complaint made against the operation of the clause in some cases is, that it occasions a loss of revenue.

These objections have furnished the field for much argumentative attack and the starting point for several not very effective crusades against most-favored-nation treaties. We have already mentioned certain opposition to the clause on the part of Spain, Portugal, France, and South American countries. Dr. Costa, of Argentina, has argued that the Argentinians cannot gain sufficient from such treaties to compensate them for what they concede, because so few Argentinians reside in Europe while Argentina has a relatively immense foreign population. Sr. Gueselaga, in his "Estudio de los tratados de comercio de la Republica Argentina", urged the denunciation of all the Argentinian treaties in order to eliminate the most-favored-nation clause entirely.[10] Dr. Costa's argument applies to the incidental advantages such as treatment of subjects, rather than to those extended to commerce and navigation directly.

In France, in 1889, the extreme protectionists desired to exclude the clause from all future treaties, on the ground that, although France had less to fear in given lines of production from one country than from another, yet the advantages given

[8] Der Inhalt der Meistbegünstigungsverträge bestimmt sich nicht durch meinen Vertragswillen, sondern durch den Vertragswillen anderer Staaten. In the Reichstag, Jan. 22, 1892. Glier, 354.

[9] Diese Erklärungen bilden u. E. das stärkste Argument gegen die unbedingte Meistbegünstigung. Glier, 353.

[10] Quoted in Argentina: Doc. Dip. y Consulares., Bol. No. 17, 1903, p. 9.

one had to be given to the other.[11] Still another argument for doing away with the clause is that its use makes a concession offered in negotiation with a third party less valuable to that party because it is known that the concession must be or may be given to another or other nations.

On the other hand, the majority opinion champions, and the general practice favors, the retention of the clause. Commercial treaties, suggests Von Melle,[12] may be divided, as regards their tariff provisions, into three classes: first, those containing only *special tariff agreements;* second, those which in addition, have the *most-favored-nation clause;* third, those which have *no special tariff agreements,* but *only the most-favored-nation clause.* In the first, the parties agree to charge no higher tariff than that specified in the schedule. This restricts each in its freedom of action, but only as against the co-contractant and not as against a third nation. If, now, a most-favored-nation clause be used without the tariff provision, an increase in the tariff is allowed, but the treatment of the co-contractant must not be less favored than that of any other nation. A state bound by such a treaty can neither raise its tariff nor lower it for the benefit of a second state. This constitutes a limitation, and may be inconvenient, but, as the reciprocal principle holds, the advantages in general may outweigh the inconvenience.[13] A state gains, as compensation, a firm tariff basis, an assurance that alterations will take place only in the direction of lowering, and that the competition of any other state, through special advantages which might be given it by a higher tariff, is not to be feared.[14]

This security which can best be obtained through the most-favored-nation clause, constitutes a very great advantage in international trade, and is so important that the limitation of freedom and loss of customs duties must be made a minor consideration.[15] At once rigid and elastic, by its rigidity insuring against surprises and by its elasticity easing the shock of sudden changes in commercial policy, the clause performs an invaluable

[11] See Meredith: Protection in France, 20-22.
[12] *Op. cit.,* 210.
[13] *Cf.* Fontana-Russo: Trattato di Pol'tica-Commerciale, 606.
[14] *Cf.* Yves Guyot: La Comédie Protectioniste, 32.
[15] Von Melle, *op. cit.,* 210.

function in international trade. Its important influence in the overthrow of the individualistic and dualistic commercial policies which formerly hindered world commerce has already been emphasized. Its all important function in automatically establishing the conventional schedule in the "general and conventional" tariff system, and in preventing the inevitable confusion which would arise from the extensive use of tariff-treaties in its absence is too well recognized to need emphasis.

Logically, the universal acceptance of that form and interpretation of the clause which would satisfy the "unconditional" school would eventually lead, whether that be its object or not, to absolute free trade. To the defenders of the limited interpretation, who argue that to extend gratuitously to one nation that which has been purchased by a third is unfair to the latter, the adherents of the opposite interpretation answer that this would be true if the discrimination were against one nation only, but that if the rule be applied to all, all will be equally benefited, and there will therefore be no discrimination, and, further, that the benefits of such an application work both ways. This is simply another way of saying—all unconsciously, perhaps—that the universal use of the clause, in its unqualified form, with strict interpretation, would abolish all protective systems, and, as we have remarked, result in free trade.[16] Some even go so far as to argue that under the other interpretation the clause has no value since it offers no constant or certain guarantee. This argument—all else aside—overlooks entirely the chief function of the clause, which is—to prevent discrimination. On the other hand, under the Utopian system to which universal unconditional usage would lead, that of free trade, the clause would have no value as it would be absolutely redundant.

The explanation of the disagreement is to be found in the conflict of commercial policies. In viewing the politics of modern commerce we have to take into consideration that there are

[16] "'By the self-registering action of the most-favored-nation clause, common to this network of treaties, the tariff level of the whole body is continually lowered, and the road being paved towards the final embodiment of the Free Trade principle in the international engagement to abolish all duties other than those levied for revenue purposes.'" (Morley, Life of Cobden, II, 342.)

no less than five tariff systems in operation. First comes the English system of approximate, though not absolute, free-trade.[17] A country following such a system can make unqualified most-favored-nation treaties with a consciousness that it has everything to gain and practically nothing to lose. At the opposite extreme come countries such as the United States, with a general tariff at the same time highly protective and comprised in a single schedule of duties. A general acceptance of the unconditional usage would make it necessary for countries which have and wish to retain this system either to omit the clause entirely from their treaties, or to limit the number of treaties containing it to a small circle of nations and refrain absolutely from granting concessions to other nations. No nation in the position of the United States, and with a highly-protective, single-schedule tariff, could, with due regard to economic circumstances, give most-favored-nation concessions under other than the United States interpretation, nor has the United States ever meant to do so.[18]

Between the two extremes come the three systems which have developed practically within the past twenty-five years, the "maximum-and-minimum," the "preferential" and the "general-and-conventional" tariffs. In the operation of the maximum-and-minimum system, as exemplified in France, commerce with any given country is less dependent upon treaties than under systems where legislative control is more indirect. It is true that even here, unconditional most-favored-nation treatment means the admission of all who enjoy the right, to participation in privileges extended to *whatsoever* nation, but there is a common stopping point, the minimum rate, for concessions. Since, however, as has happened in their dealings with Switzerland, Italy, and Russia, the French may be forced to grant concessions below the minimum, the operation of this system is not

[17] Great Britain has a list of twenty dutiable articles, the duties being levied for revenue or sumptuary purposes only.

[18] "It would require the clearest language to justify the conclusion that the United States government intended to preclude itself from * * * engagements with other countries which might in future be of the highest importance to its interests." (Whitney v. Robertson, 124 U. S. 190.) *Cf.* Barclay, Problems of International Diplomacy, 140. *Cf. Supra.*

unqualifiedly successful and most-favored-nation treatment under it is not without embarrassment.[19]

The new systems of preferential tariffs which are being developed by the British Colonies in South Africa, Australia and Canada violate the strict principle of unconditional most-favored-nation treatment. The South African Colonies and Australia have two-column tariffs, giving a preferential to the Mother Country and reciprocating British Colonies by means of a surtax on the products of other countries. Canada has adopted a three-column tariff, with a general rate, a preferential rate for England and the Colonies, and an intermediate rate to be extended to countries which make satisfactory concessions in return. Although in theory the inter-relations of Mother-Countries and their colonies are to be excepted from the operation of the clause, yet that theory contemplates *dependent* colonies. The autonomous position of these larger British colonies is such that their commercial dealings and the establishment of their tariff policies approximate those of sovereign and independent countries. Logically, and in practice, their preferential is inconsistent with the idea of unconditional favored nation treatment.

The general and conventional tariff system, of which Germany is the foremost exponent, really owes its success to the most-favored-nation clause. It is only by the operation of the clause that the conventional rate is established, and it is only because each nation knows that it is guaranteed by the clause against subsequent discrimination that it is possible to negotiate successfully the treaties which are a necessary part of the system.[20] In this system, a protective tariff and unconditional most-favored-nation treatment can be harmonized. Yet, even here, the knowledge that the clause generalizes concessions exercises a de-

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[19] See Fisk: International Commercial Policies, 95.

[20] As an excellent example of the imperative and unconditional form used in the new German treaties we may cite the treaty between Germany and Russia, January 29, 1894, July 15, 1904, article VI:

The products of the soil and industry of [each, when imported into the other] destined for consumption, warehouse, re-exporting, or transit, will be treated in the same manner as the products of the most favored nation. In no case, and on no account will they be liable to duties, charges, taxes, or dues higher or other, nor be subjected to surtaxes or to exclusion from im-

cidedly restraining influence in negotiations. The government must, in each case, weigh not alone the advantages to be gained in a contemplated treaty, but the effect which the concessions will have on its commercial intercourse with all the other countries to which it owes most-favored-nation treatment. It can not afford, for instance, to grant a large concession to a country with which it has a comparatively slight volume of trade, even though it gain a very real advantage from the return concession, because its own concession must at once be generalized. Thus it hinders as well as helps even in this system. The striking success of the general and conventional system must, however be recognized. Next to the free trade system, it is best adapted to unconditional most-favored-nation practice.

Apropos of the interpretation made by the United States of the reciprocity treaty with Hawaii, 1875, M. Visser suggests that the "impossibility" for other nations to fulfil the conditions necessary to entitle them to enjoy privileges similar to those enjoyed by the United States was an "impossibility" announced by the United States because of the fact that under any other interpretation the treaty would have no value for the United States. The observation fails to carry its intended argumentative weight against the American contention—as there was a *very real impossibility*, and as the circumstances were unusual[21] —but, in its very directness, it furnishes an excellent justification of the American interpretation. Not that a country should interpret every treaty to its own advantage, and overreachingly, but because every reciprocity treaty is framed with the idea of securing mutual advantages, and commercial policies are dictated by motives of economic and political self-interest. To give

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portation by which the similar products of any other country are not affected. *Especially any favor and facility, any immunity, and any reduction of the customs dues contained in the German tariff or in the treaty tariffs which one of the contracting parties may give to a third power permanently or temporarily, gratuitously or for compensation, will immediately and without conditions, reservations, or compensation be extended to the products of the soil and industry of the other.*

[21] *Cf.* Herod, *op. cit.*, 116.

"A stipulation, though inconvenient, must be fulfilled if it be explicit; but, in case of doubt, the inconveniences which would result from a particular construction may be used as an argument to show that that construction can not be conformable to the intent of the parties." Livingston to Lederer, Nov. 5, 1832. Moore, *op. cit.*, V. 251.

to such a treaty an interpretation by which it would have no value for one of the contracting parties would be directly contrary to its character and to the spirit in which it was made. Each nation expects when making, and therefore when interpreting, its treaties, that they shall conform to the general scheme of its commercial policy and operate to its commercial advantage.

To these circumstances we must look for an explanation of the differences in present practice, while to the fact that the historical background has been lost sight of we owe most of the disagreement over the interpretation of old treaties. European countries, having adopted commercial policies and a form of the clause different from those which they used at one time, now wish to make the interpretation of all the treaties, both new and old, conform to their present policy.

When view points differ it is very natural that two parties fail to read the same meaning from the words of a clause, where a slight shifting of emphasis makes a great difference to their commercial interests. The content of such terms as "favor", "protection" and "reciprocity" assume a very different meaning in the mind of a protectionist nation which must weigh concession against concession, from that which they are given in the vocabulary of a free-trade nation.[22]

Can a common ground be reached? Certainly this should be possible as far as regards the interpretation of old treaties. As for treaties made since 1860, it would appear fair that the distinction between those clauses which contain the stipulation for compensation and those which do not be recognized, and that the former be interpreted as conditional and the latter as unconditional. At the same time the acceptance of this rule, aid though it would, would by no means rid us of the confusion which must exist as long as both systems continue in vogue.

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[22] "What we [English] forget is, that, in its commercial policy, every other Nation has to think of its tariff relations with the whole world—of which we are not always the largest part. And what we should remember is that it would be a very serious thing for a protected country to give us advantages that it might otherwise be inclined to give us, when, under its Most-Favored-Nation Clause, it would have to give the same advantages to other nations." (Smart: The Return to Protection, 137).

Cf. Poinsard: Droit International, 373–4, and Grunzel; System der Handelspolitik, 464.

One of the first impulses among those European nations which in recent years have felt themselves suffering on account of the interpretation placed upon the clause by the United States, was to accept the American interpretation in their dealings with the United States, while retaining the European usage in their dealings with their nearer neighbors. This, however, was impossible for if they first use the European interpretation in dealing with European states, then follow the American interpretation in dealing with the United States, they have to give the latter all the advantages which they give "freely" to other Europeans, and therefore they neither save themselves, nor do they retaliate on the United States.

To illustrate: the German treaties concluded between 1903 and 1906 with the Central European States were based on reciprocity, with mutual concessions, but later Germany, in fulfilling her favored-nation obligations, extended the conventional rates made up from these concessions, to Great Britain, France, and other States "freely". If, then, the Prussian-United States treaty of 1828 had been considered as having full force, Germany would have had to extend all of the same advantages to the United States (freely).[23]

To arrive at a universal system, either European countries must return to that usage which they once practiced in common with the United States, or the United States must give up the system to which she has uniformly held. Neither change could well be effected without changes in commercial policy. There has been some tendency among European economic writers to favor the American most-favored-nation practice as the more expedient and better fitted in the long run to protect commercial interests. If Great Britain swings strongly toward protection, and if the preferential system develops more extensively, there will be good reason for the English to consider a departure from the use of the unconditional clause. The adoption of the conditional form by the Continental nations would somewhat lessen the facility with which tariff-treaty negotiations may be carried on, but it would at the same time free the

[23] *Cf.* Stone: N. Am. Rev., 1906, 182: 445. *Cf. supra.*

negotiators from a number of cramping restrictions. There is, however, no likelihood of such a change being soon consummated. It would be impossible for a decade, since European tariff-relations are settled for that period by the new treaties, most of which run till 1915 or 1917.

For the United States to change would require a radical departure from present commercial policy. Such a change has been made the subject of much discussion. The necessity for a commission to give our tariff policy a scientific and searching consideration as has been done in Germany and France, and as is being done in England, has been urged—and with reason. The possibilities of the conventional and of the maximum-and-minimum systems have been repeatedly canvassed. It is agreed that the machinery of our government makes the conventional system impracticable, in fact impossible. It has been pointed out by some writers that, under it every reciprocity treaty would have to be approved not only by the Senate but by the House, since each would contain new tariff rates which, under the constitution, only the lower house can initiate. The negotiation of a series of treaties would take a long time, and the making of a conventional tariff at the hands of successive congresses would be very difficult.[24] The alternative would be the maximum-and-minimum system. In this the minimum rate could be made uniform by act of Congress and the department of state would be free to make treaties on a reciprocity basis for rates between the minimum and the maximum. To this, Senator Beveridge argues that we must come. Mr. William R. Corwine urges that we should "join the procession of modern nations which have, one after another, discarded the single tariff and adopted one form or another of the maximum and minimum," but he also advocates the elimination of treaties altogether, and that the President be authorized to make commercial agreements within the limits imposed between the maximum and minimum.[25] Professor Willis suggests that the adoption of the unconditional most-favored-nation usage along with tariff treaties would lead to

[24] See Stone, Ann. Am. Acad., 1908, 32: 379–80. See Sen. Beveridge, *ib.* 409 ff.

[25] See Ann. Am. Acad., 1908, 32: 312, 313.

progressive tariff reductions, and that it would be difficult indeed to get treaties having such an effect through Congress. The maximum and minimum plan would, in his opinion, be clumsy if the minimum duties represent a horizontal reduction from the maximum. To obviate these difficulties he suggests a modification of the latter system; that Congress expand the list of articles contained in Sec. 3 of the Dingley Act and leave to the President the making of reciprocity bargains. Such a system would, he believes, obviate many difficulties as it would admit of the adoption by the United States of the European favored-nation practice.[26]

Since it is a fact that commercial policies differ, and since it is known to every diplomat that treaties have been made and are being made under different circumstances and with differing wordings, old misunderstandings ought to be cleared up, and mutual recriminations should cease.

The attitudes of the leading representatives of the opposing interpretations have been repeatedly stated and regularly maintained. The tariff policies and the motives of each are well known to the others. The treaty-making authorities of each of the great nations have little excuse for entering into future most-favored-nation treaties with others and subsequently claiming that the interpretation put upon the favoring clause by those others is unfair—as each may see in advance what that interpretation is to be. A general agreement should be reached as to the interpretation of each form of the clause, and, if possible a common form should be devised whose meaning will be unequivocal, which can be accepted or rejected upon an absolute basis of interpretation.

Von Steck and Von Melle recognized long since the necessity

[26] Willis, H. P.: Reciprocity with Germany. Jour. Pol. Econ. 1907, 15: 385-398. "Back of this [the problem of tariff policy] is the question to be determined by the State Department with regard to the future interpretation of the most-favored-nation clause. The adoption of the European interpretation of that clause will bring our commercial diplomacy into line with that of other nations, and will do away with serious danger of friction in the future. Could the adoption of the European interpretation * * * be coupled with such a policy of tariff revision as has been suggested, the commercial difficulties which now threaten, not only from the side of Germany, but in other quarters as well, would be definitely removed." (*Ib.* 394-395.)

for definite and unequivocal stipulations.[27] De Martens and Lehr have advocated a more exact definition, for instance a provision that " the contracting parties shall concede to one another all the advantages relative to commerce and navigation accorded by them *gratuitously* to any other power whatsoever," advantages accorded by exchange or for compensation to be entirely excluded from this class.[28] This suggested form accords almost exactly with the interpretation of the United States. The possible objection to it lies in the comprehensiveness of "any other power whatsoever."

Count Posadowsky has said that in future treaty-making it will be necessary to individualize the question of most-favored-nation treatment more specifically and to examine cases individually.[29] Mr. Chester Lloyd Jones strongly urges the advantages which attach to the American usage.

> As applied both to treaty-making and legislation in general the interpretation of the most-favored-nation clause adopted by the United States has the decided advantages of flexibility and certainty. It allows the adjustment of relations to varying conditions and thus avoids the adoption of uniform rules which in many cases would in fact amount to discrimination. It also avoids the uncertainty on the part of the legislatures and the courts which must of necessity be present when, due to the interlocking of the provisions of various treaties, it is not clear to which body of facts any law or treaty may apply.[30]

Sig. Cavaretta believes that whatever reform is made should be on a basis of reciprocity and that treaties should be concluded for a definite period of time.[31] Reciprocity is certainly,

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[27] *Cf.* Von Melle, *op. cit.*, p. 207.

[28] "* * * nous pensons, d'accord avec notre éminent collègue, qu'il est essentiel de remplacer cette clause dans les traités à conclure par une définition plus exacte, par exemple, par une disposition portant que 'les parties contractantes se concèdent mutuellement tous les avantages relatifs au commerce et à la navigation, accordés par elles gratuitement à n'importe quelle autre puissance.' Quant aux avantages accordés moyennant échange ou compensation, il nous paraît qu'ils devraient toujours être exclus de la clause." (Lehr, *op. cit.*, 315–316.)

[29] In the Reichstag, Jan. 15, 1903. Quoted in Glier, p. 323.

[30] C. Lloyd Jones: The American Interpretation of the Most-Favored-Nation Clause. Ann. Am. Acad., 1908, 32: 393.

[31] Cavaretta, *op. cit.*, 167–168, and note 2.

although it may not be admitted in individual instances, the principle aimed at in the commercial policies of modern nations.

Whether accepting, as many do, or rejecting the idea of framing a clause which will embody the principles involved in the "compensation" form, all who discuss the clause agree that care should be taken in making future treaties, and that the interests of commerce and international good-fellowship demand that nations come to an agreement as to means and methods for avoiding misinterpretation. In 1902, the Dairy Congress in Belgium adopted a resolution favoring either the abolition of the clause, or the insertion of a provision restricting it and specifying that its operation should not extend to reductions of duties or the liberty of trade which had been conceded to other nations on a basis of reciprocity.[32] As a result of discussion at the Pan-American Scientific Congress, at Santiago, Chile, December 25, 1908—January 5, 1909, the Congress voted:

> The Pan-American Scientific Congress, in view of the difficulties which have been caused by the interpretation of the most-favored-nation clause, recommends that the bearing of the clause should be defined in each treaty in which it is stipulated. When the most-favored-nation clause is granted, the respective governments should remain free to make special concessions to neighboring countries.[33]

Sir Thomas Barclay suggested in a paper read at the Conference of the International Law Association at Portland, Maine, August 3, 1907, this resolution:

> Whereas any varying interpretation of the most-favored-nation clause gives rise to instability * * * it is suggested that any State holding itself to be aggrieved by any such varying interpretation should be entitled to cite the co-

[32] Argentina: Doc. Dip. y Consulares. Bol. No. 17, 1903, 17-18.

[33] Señor Ernesto Frias, of Uruguay, read a paper in which he favored the abandonment of the most-favored-nation clause for a system of maximum, minimum, and special tariffs. Señor Julio Philippi, of Chile, argued that the most-favored-nation clause need not be considered incompatible with other systems of tariff policy, and urged that much of the inconvenience which attaches to the use of the clause on account of the uncertainty as to its interpretation could be avoided if nations would stipulate in the treaties in which they insert the clause just what interpretation is to be given it.

> contracting party before the Hague Court, and that the jurisdiction of the said Hague Court in all such matters should be accepted without reservation.[34]

A hopeful sign appears in the arbitration provisions which are being incorporated in increasing number in the texts of commercial treaties. For instance, the protocol following the treaty between Great Britain and Italy of June 15, 1883, declared that:

> Any controversies which may arise respecting the interpretation or execution of the present treaty, or the consequences of any violation thereof shall be submitted, when the means of settling them by amicable agreement are exhausted, to the decision of the commissioners of arbitration, and the result of such arbitration shall be binding upon both governments.[35]

The new German treaties, with the exception of that with Russia, provide for arbitration of difficulties over the interpretation or application of the tariff or of most-favored-nation treatment. Most of the others of the recent group of central European treaties contain similar provisions.[36]

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[34] See Yale Law Journal, 1907, 17: 32.

[35] The next paragraph prescribed for the selection of the commission.

[36] See treaty between Austria-Hungary and Germany, Jan. 25, 1905. The treaty between Great Britain and Bulgaria, Nov. 26, 1907, provides, Art. XVIII, that "Any controversies * * * regarding the interpretation or application of the tariffs annexed * * * including the additional stipulations * * * as well as the rates of the convention tariffs agreed upon between the contracting parties and third States, shall, on the demand of one or other * * * be adjusted by means of arbitration."

The treaty between Great Britain and Servia, March 31, 1908, Article XIV, contains similar provisions.

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[1] This bibliography is not meant to be exhaustive and includes only such works and articles as have contributed directly to, or have been found to have a direct bearing upon, points involved in this study. With a few exceptions, general works upon commerce and international law have been intentionally omitted.

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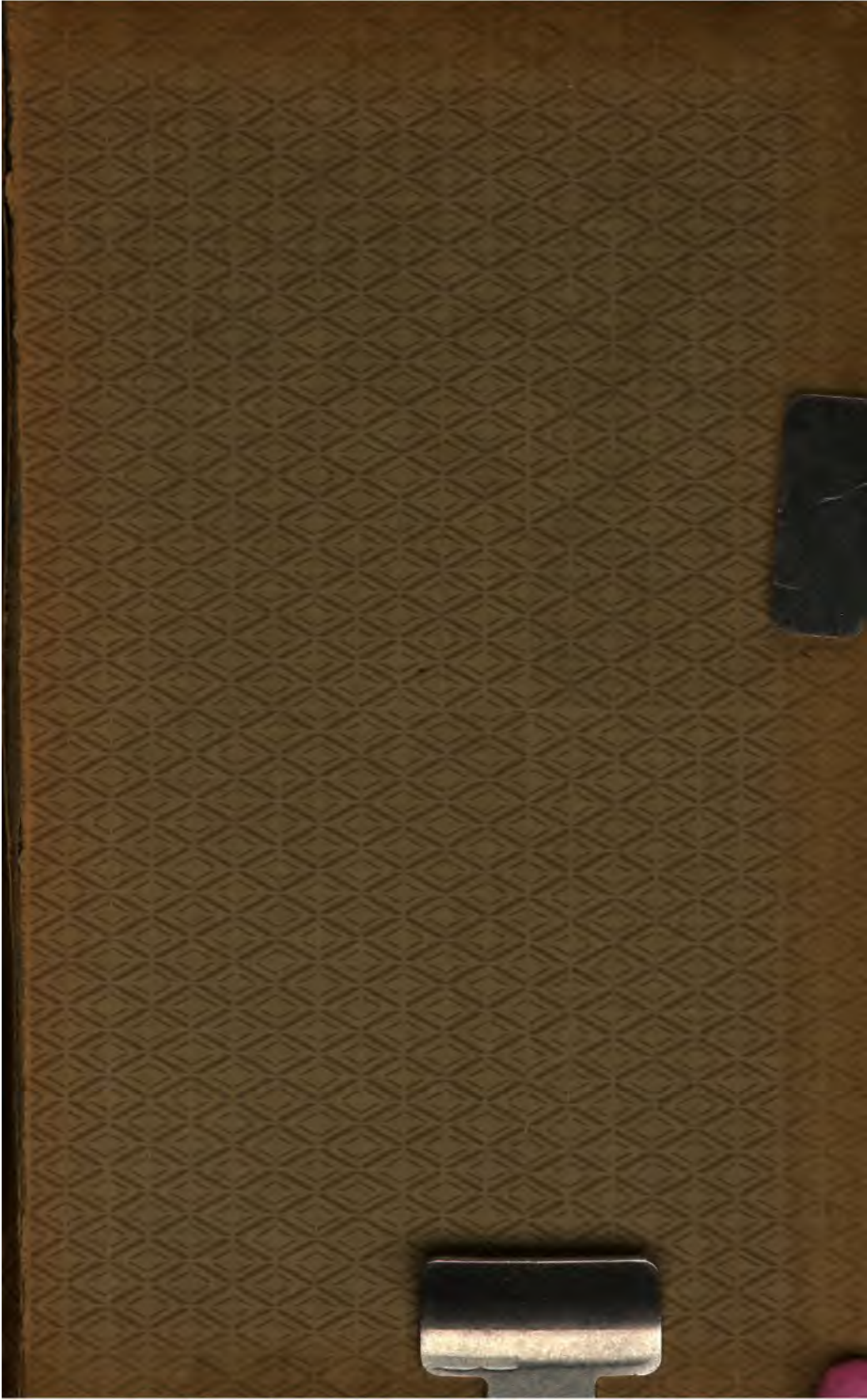

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